(29,012)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 462.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., PETITIONER,

vs.

GEORGE WECHSLER.

ON WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

INDEX.

	Original.	Print.
Caption in Kansas City court of appeals	1	1
Appellant's abstract of record	1	1
Petition for damages	2	1
Petition for removal to U. S. district court	5	3
Bond for removal	8	4
Notice of filing of petition and bond	10	5
Journal entries	11	6
Defendant's motion to strike out plaintiff's amendment to petition	12	6
Answer to plaintiff's first amended petition	13	7
Amendment to petition	15	8
Amended reply	16	9
Amended petition	17	9
Journal entries	20	11
Motion for appointment of physician and order overruling	21	12
Verdict	22	12
Judgment	23	12

Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., March 23, 1923.

	Original.	Print.
Journal entries	24	13
Order substituting parties defendant	25	14
Journal entries	26	14
Bill of exceptions of defendant	27	14
Testimony of Mrs. Margaret Ergenbright	28	15
Plaintiff's Exhibits 1 to 6, Inclusive—Photographs of the wreck	34a	19
Testimony of Mrs. Carrie Brock	37	21
George Wechsler	41	24
Dr. A. W. Biell	75	46
Mrs. Catherine Lowry	97	59
Dr. J. Park Neal	129	78
Roy B. Thomson	149	89
Frank Millhouse	152	91
Christ F. Miller	157	94
Thomas L. Ritchey	166	99
Miss Marie Thompson	176	105
Miss Mae L. Cash	178	106
H. P. Leigh	180	107
Miss Marie Lawson	186	111
Miss Cecilia Leiter	188	113
Colloquy between court and counsel	189	114
Testimony of Dr. B. H. Miller	193	116
Dr. Walter C. Myers	198	119
Dr. B. H. Miller (recalled)	202	121
Dr. James Whitney Hall	203	122
Exhibit A—Letter, Jas. Whitney Hall to Mont T. Prewitt, July 9, 1920	224	133
Testimony of George Wechsler	238	141
Exhibit 7—Letter, Hogsett & Boyle to Warner, Dean, Langworthy, Thomson & Williams, July 31, 1920	239	143
Defendant's requested instruction No. 1	242	144
Plaintiff's requested instructions A and B	243	145
Defendant's requested instructions Nos. 2 to 8, inclusive	244	146
Instructions of the court	248	147
Verdict	249	148
Motion for new trial	250	149
Motion in arrest of judgment	253	150
Order substituting parties defendant	254	151
Application for appeal	255	152
Order allowing appeal	256	152
Order settling bill of exceptions	256	153
Index	258	153
Caption in Kansas City court of appeals	259	156
Judgment of circuit court of Jackson County	259	156
Order allowing appeal	261	157
Clerk's certificate, county court	261	157
Submission of cause	262	158

	Original.	Print.
Judgment	262	158
Opinion, Bland, J.	263	159
Appellant's motion for rehearing	276	165
Order overruling motion for rehearing	283	169
Memorandum opinion on motion for rehearing	283	170
Clerk's certificate, Kansas city court of appeals	284	170
Proceedings in supreme court of Missouri	285	170
Caption	285	170
Order overruling petition for writ of certiorari	286	171
Notice and proof of service of petition for writ of certiorari	286	171
Petition for writ of certiorari	287	172
Suggestions in support of petition	292	174
Exhibit A to Petition—Judgment of Kansas City court of appeals	298	177
Order of Kansas City court of appeals overruling motion for rehearing	299	178
Opinion of Kansas City court of appeals on motion for rehearing	299	178
Opinion of Kansas City court of appeals, Bland, J.	300	178
Exhibit B to Petition—Appellant's motion for rehearing in Kansas City court of appeals	313	178
Clerk's certificate, supreme court of Missouri	320	179
Clerk's certificate, Kansas City court of appeals	320	179
Writ of certiorari and return	322	180

1 No. 14267.

IN THE

Kansas City Court of Appeals,

OCTOBER TERM, 1921, DECEMBER CALL.

GEORGE WECHSLER, Respondent,

vs.

JAMES C. DAVIS, Director General of Railroads and Agent Designated by the President under Transportation Act 1920, Appellant.

Appeal from Circuit Court of Jackson County, Mo.

Hon. Samuel A. Dew, Judge.

Abstract of the Record by Appellant.

This action was begun on the 29th day of January, 1920, by the plaintiff filing in the office of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, a petition making
2 Walker D. Hines, director general of railroads in charge of and operating Chicago Great Western Railroad Company, defendant. (John Barton Payne, director general of railroads and agent designated by the President under Transportation Act of 1920, was substituted as defendant as successor in office of said defendant, Walker D. Hines, and later the present defendant, all as hereinafter shown). Upon the filing of said petition summons was thereupon issued, returnable to the March Term, 1920, of said court, and served on said original defendant, Walker D. Hines, and he appeared to the action.

Said petition as originally filed is in words and figures as follows, to-wit, omitting caption and signature:

Petition for Damages.

In Circuit Court of Jackson County.

Now comes plaintiff and for his cause of action against the defendant states that Walker D. Hines is now and at all times herein mentioned was director general of railroads, and as such in charge of and operating the Chicago Great Western Railroad and the Chicago Great Western Railroad Company, a corporation duly organized and existing according to law.

That the defendant is now and at all times herein mentioned was engaged in the operating of a line of steam railroads in the State of Missouri known as the Chicago Great Western Railroad, includ-

ing the tracks, train and cars hereinafter mentioned, as a common carrier of passengers for hire.

3 That the plaintiff is now and at all times herein mentioned was a citizen and resident of the State of Illinois.

That on or about the 3rd day of January, 1920, about the hour of 7:15 or 7:30 A. M. the plaintiff was a passenger on a southbound train of the defendant on the Chicago Great Western Railroad running southbound on the track of said railroad at a point near the town of Wyeth, in the State of Missouri. That plaintiff had paid his fare to the defendant for the privilege of riding on said train and was a passenger thereon in one of the coaches thereof. That while plaintiff was riding on said train as a passenger, said train as a direct result of negligence on the part of the defendant and the defendant's agents, servants and employes became derailed and left the track upon which it was running and a portion of the cars and coaches composing said train turned over, including the coach in which plaintiff was riding, and said train came to an abrupt stop. That as a direct result of said occurrences the plaintiff was thrown against portions of the coach in which he was riding and as a direct result thereof he sustained the following severe, painful and permanent personal injuries:

He was bruised and injured upon his head, body and limbs. His left side, left hip and limb, left thigh, right ankle, foot and limb, and the bones, joints, muscles, nerves, ligaments and other tissues of said parts, and connected therewith were wrenched, sprained, bruised, lacerated and injured and the structures and functions thereof injured and impaired. His left ear and the left side

4 of his face and head were lacerated, bruised and inflamed. He suffered a profound shock and injury of his entire nervous system. That as a direct result of said injuries plaintiff has suffered and will suffer great physical pain and mental anguish, and has been and will be disabled from work, and has lost and will lose time from his occupation and earnings therefrom, and has suffered and will suffer an impairment of his earning capacity, and he has been and will be compelled to pay out and incur liability for sums of money for medical and surgical attention, and he has been and will be crippled and disabled and the structures and functions and usefulness of the injured parts aforesaid greatly impaired.

That all of said injuries and the results and effects thereof are permanent and lasting in their character and effect and the same directly resulted from the aforesaid negligence of the defendant, and the defendant's agents, servants and employees.

That as a direct result of the facts aforesaid the plaintiff has been damaged in the sum of Fifteen Thousand Dollars ($15,000) for which sum with costs of suit plaintiff prays judgment against the defendant.

Thereafter and on March 10th, 1920, the same being the third day of the March Term, 1920, of said court, said defendant filed in said court his petition and bond for the removal of this cause to the District Court of the United States, which said petition and

bond for removal were in due and proper form, and the de-
5 fendant at said time after having duly served the same, filed with the clerk of said court notice of the filing of said petition and bond for removal, and said Circuit Court then made an entry of record that said petition and bond and notice of filing thereof were filed with said clerk, which said petition and bond for removal and notice of filing thereof are in words and figures as follows, omitting caption:

Petition for Removal to the United States District Court.

In Circuit Court of Jackson County.

Your petitioner, Walker D. Hines, Director General of Railroads, in charge of and operating Chicago Great Western Railroad, defendant in the above entitled cause, avers that this suit was begun in the Circuit Court of Jackson County, Missouri, on or about the 29th day of January, 1920, by the filing in the office of the clerk of said Circuit Court a petition in said cause, and by service of a writ of summons upon the above named defendant by the sheriff of Jackson County, Missouri; that said cause is still pending and undetermined, and that the term of said Circuit Court, begun and held in the City of Kansas City, Jackson County, Missouri, on the 8th day of March, 1920, is the first term of said court at which said cause may be tried; that said cause has not been tried, and that the above named defendant is not required under the statutes of this state, or the rules of said Circuit Court, to answer or plead to said petition until the 10th day of March, 1920.

6 That this action is founded upon an alleged liability of your petitioner for an alleged personal injury alleged to have been received by the plaintiff on or about the 3rd day of January, 1920, by the defendant operating its railroad and the train upon which plaintiff was riding becoming derailed causing personal injury to plaintiff; that said suit — of a civil nature; that plaintiff claims in his petition the sum of $15,000.00 damages; that the matter in dispute in said controversy, exceeds, exclusive of interest and costs, the sum or value of $3,000.00 to-wit $15,000.00.

That this action involves a controversy between citizens of different states; that the plaintiff, George Wechsler, is, and at the time of the commencement of said suit was a citizen and resident of the State of Illinois, and at the time of the commencement of said suit, the defendant was, and still is, a citizen and resident of the State of New York, with his official residence in the City of Washington, District of Columbia, and at no time has he been a citizen and resident of the State of Illinois.

Your petitioner further avers that the question of liability of your petitioner herein under plaintiff's petition is among other questions one arising under the constitution and laws of the United States, and presents a federal question entitling this defendant to remove this suit to the United States District Court, your petitioner expressly denying any liability under plaintiff's petition.

Your petitioner offers herewith a bond with good and sufficient surety for the entering in the District Court of the United States for the Western Division of the Western District of Missouri, within thirty days from the filing of this petition, copy of the record in this action, and for paying all costs that may be awarded by said District Court if said District Court shall hold that this action was wrongfully or improperly removed thereto, and also, for his appearing and entering special bail in said suit if special bail was originally requisite therein.

Wherefore, your petitioner prays that this action be removed into the District Court of the United States for the Western Division of the Western District of Missouri,, and that this court proceed no further herewith. Warner, Dean, Langworthy, Thomson & Williams, Attorneys for Defendant.

STATE OF MISSOURI,
County of Jackson, ss:

Roy B. Thomson, of lawful age, being first duly sworn on his oath says that he is the attorney and agent for the within named defendant, Walker D. Hines, Director General of Railroads, in charge of and operating Chicago Great Western Railroad, and as such attorney and agent has authority to, and makes this affidavit for and in behalf of said defendant; that he has read over and knows the contents of the above and foregoing petition, and that the averments and allegations therein contained are true to the best of his information and belief. Roy B. Thomson.

Subscribed and sworn to before me, this 8th day of March, 1920. My term expires August 26th, 1920. Mary M. Friel, Notary Public within and for said County and State. (L. S.)

Bond for Removal.

In Circuit Court of Jackson County.

Know all men by these presents:

That we, Walker D. Hines, Director General of Railroads in charge of and operating Chicago Great Western Railroad Company, as principal, and Roy E. Thomson and H. M. Langworthy, as sureties, are held and firmly bound unto George Wechsler, the above named plaintiff in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States, to be paid to said George Wechsler, his heirs, executors and administrators, for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators, executors, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 9th day of March, 1920.

The condition of the above obligation is such that,

Whereas, on or about the 29th day of January, 1920, an action was brought by said George Wechsler against Walker D. Hines,

Director General of Railroads, in charge of and operating
9 Chicago Great Western Railroad Company, in the Circuit Court of Jackson County, Missouri, and is now pending for trial in said court, and is removable unto the District Court of the United States for the Western Division of the Western District of Missouri, by virtue of the Act of Congress in such cases made and provided; and,

Whereas, said Walker D. Hines, Director General of Railroads, in charge of and operating Chicago Great Western Railroad Company, has filed a petition for the removal of said action in the District Court of the United States for the Western Division of the Western District of Missouri.

Now, therefore, the condition of the above obligation is such that if the above bounden, Walker D. Hines, Director General of Railroads, in charge of and operating Chicago Great Western Railroad Company, or his successors or assigns, shall enter, or cause to be entered, in the District Court of the United States for the Western Division of the Western District of Missouri, within thirty days of the filing of said petition for removal, a copy of the record in this action, and shall pay all costs that may be awarded by said District Court, if said District Court shall hold that this action was wrongfully or improperly removed thereto, and shall then and there enter special bail in said action, if the same were originally requisite therein, and do and perform all other things by law required to be done upon the removal of actions from state to United States Courts, then the above obligation to *avoid*; otherwise to be and remain in full force and effect.

10 In witness whereof, the above named principal and sureties have hereunto set their hands and seals, the day and year first above written. Walker D. Hines, Director General of Railroads, in charge of Chicago Great Western Railroad, by Roy B. Thomson, Attorney and Agent, Principal. Roy B. Thomson, H. M. Langworthy, Sureties.

Notice of Filing of Petition and Bond for Removal.

In Circuit Court of Jackson County.

To the above-named plaintiff and Messrs. Hogsett & Boyle, his attorneys of record:

You, and each of you, are hereby notified that on Wednesday, the 10th day of March, 1920, the defendant in the above entitled cause will file in said Circuit Court, at Kansas City, Missouri, his petition and bond for the removal of said cause to the United States District Court for the Western Division of the Western District of Missouri. Warner, Dean, Langworthy, Thomson & Williams, Attorneys for Defendant.

Copy of the foregoing notice, and copy of said petition and bond for removal, received, and service accepted this 8th day of March, 1920. Hogsett & Boyle, Attorneys for Plaintiff.

11 **Journal Entries.**

Thereafter and on March 18th, 1920, and during the March Term, 1920, of said Circuit Court, the defendant withdrew his petition and bond for removal of this cause to the United States District Court and said Circuit Court made an entry of record that such bond and petition for removal were so withdrawn.

Thereafter and on March 19th, 1920, and during the March Term, 1920, of said court, plaintiff amended his petition by reducing the amount prayed for from $15,000 to $3,000, and at said time said court made an entry of record that such amendment was made and granting leave of court therefor.

Thereafter and on April 7, 1920, and during the March Term, 1920, of said court, and in due time defendant filed answer to said petition.

Thereafter and on April 14th, 1920, and during said March Term, 1920, of said court, plaintiff filed reply to said answer.

Thereafter and on or about July 31st, 1920, the plaintiff amended his petition by interlineation by adding the words, "and his kidneys," following the allegation of injury to his right ankle, foot and limb, and also the words, "he has lost weight and strength and." (Admission of parties, Record, p. —.)

Thereafter and on November 16th, 1920, and during the November Term, 1920, of said court, plaintiff amended his petition
12 by erasure and interlineation by raising the amount prayed for from $3,000.00 to $15,000 and on said date said court made an entry of record that plaintiff amended his petition by erasure and interlineation by leave of court.

Thereafter and on December 1st, 1920, and during the November Term, 1920, of said court, defendant filed a motion to strike out plaintiff's amendment to his petition, which said motion is in words and figures as follows, to-wit, omitting caption and signature:

Defendant's Motion to Strike Out Plaintiff's Amendment to His Petition.

In Circuit Court of Jackson County.

Comes now the defendant and states to the court that this suit was originally instituted in this court, and damages prayed against defendant in the sum of $15,000.00; that thereafter and in due time defendant served and filed in the manner provided by law its petition and bond for removal to the Federal Court, and notice of such filing and notice to call up the same for disposition in this court; that while said petition for removal was so pending, plaintiff acting through his attorney, agreed that if the petition and bond for removal were with-

drawn by the defendant that plaintiff would amend his petition so that the prayer for damages should be in the sum of $3,000.00; that defendant acting through his attorney consented thereto and withdrew said petition and bond for removal, and said plaintiff amended his petition by reducing the amount sued for to $3,000.00, and defendant answered to said petition; that thereafter and on or
13 about November 16th, 1920, plaintiff again amended his petition by erasing the words "three thousand dollars," and interlining in lieu thereof the words "fifteen thousand dollars ($15,000.00)," in the last paragraph of said petition, so that the prayer for damages was again raised to $15,000.00.

Defendant further state- that said amendment increasing the amount sued for is contrary to the provisions and spirit of the agreement of the parties hereinabove set out.

Wherefore, defendant prays that said amendment of November 16th, 1920, above referred to, be stricken out.

Thereafter and on December 17th, 1920, and during said November Term, 1920, of said court, defendant's motion to strike out plaintiff's amendment to his petition was by the court overruled, to which action and ruling of the court the defendant excepted, and the court made an entry of record overruling said motion.

Thereafter and on January 3rd, 1921, and during the said November Term, 1920, of said court, defendant filed its answer to said plaintiff's petition, which said answer is in words and figures as follows, to-wit; omitting caption and signature:

Answer to Plaintiff's First Amended Petition.

In Circuit Court of Jackson County.

Now comes defendant and for answer to plaintiff's amended petition filed herein denies each and every allegation in said petition contained.

14 Wherefore, having fully answered, defendant prays that he be discharged with his costs.

II.

Defendant further answering plaintiff's amended petition state- that at all times mentioned in plaintiff's amended petition there was in full force and effect and binding upon the parties hereto a certain law embodied in general order of the Director General of Railroads known and described as General Order No. 18-A, issued April 18, 1918, wherein and whereby it is provided that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.

Defendant further states that plaintiff, at the time plaintiff charges he was injured and at the time of the institution of this suit, was not

a resident of Jackson County, Missouri, nor of the district in which this suit was filed, but was a resident of the State of Illinois; that plaintiff further charges that he was injured at a point near Wyeth, Missouri, and that said point is not located in Jackson County, Missouri, and not in either the county or the district in which suit was filed, and therefore, that said suit was not instituted or brought either in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose; and that in consequence thereof, this court is without jurisdiction to try or determine any
15 issues in this case or to proceed therewith.

Wherefore, defendant prays that said cause be dismissed.

Thereafter and on February 25th, 1921, and during the January Term, 1921, of said court, plaintiff again amended his petition by interlineation, and John Barton Payne, director general of railroads and agent designated by the President under Transportation Act, 1920, was substituted by agreement as successor of said Walker D. Hines, and said substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant, and the court made an entry of record that such proceedings were had. Said amendment to said petition in addition to the substitution of defendant as aforesaid was as follows:

Amendment to Petition.

In Circuit Court of Jackson County.

"That by the word 'defendant' as hereinabove used is meant the said Walker D. Hines, director general of railroads, in charge of and operating Chicago Great Western Railroad Company.

Plaintiff further states that the President of the United States by a proclamation dated March 11th, 1920, designated said Walker D. Hines, director general of railroads, as agent under Section 206 of the Transportation Act, 1920; and that thereafter said Walker D. Hines resigned as such director general of railroads and agent, and the President thereafter by proclamation appointed John
16 Barton Payne, director general of railroads and agent designated under said section of said act, and he is now acting as such; and that said John Barton Payne, director general of railroads and agent designated by the President under said Transportation Act, is now by leave of court substituted as defendant herein in accordance with the provisions of said act."

Thereafter and on February 26th, 1921, and during said January Term, 1921, of said court, plaintiff filed an amended reply in words and figures as follows, to-wit, omitting caption and signature:

Amended Reply.

In Circuit Court of Jackson County.

"Now comes plaintiff and for amended reply to defendant's answer:

I.

Plaintiff denies each and every allegation in said answer contained.

II.

Plaintiff denies that general order No. 18*a* referred to in the answer was in full force and effect and binding upon the parties hereto, and denies that same was a law affecting or controlling the parties hereto, and denies that this court is without jurisdiction to try and determine the issues in that case.

Plaintiff states that said general order No. 18*a* is now and at all times referred to in the petition was wholly and utterly void and beyond the powers of the director general of railroads to make or enforce, and in conflict with the Act of Congress, March 21st, 1918, which provided that actions at law might be brought against carriers and judgments rendered as then provided by law.

17 Wherefore, having fully replied plaintiff prays judgment as in this petition prayed."

Thereafter and on the — day of February, 1921, and during the January Term, 1921 of said court, and within a week of the trial of this cause, plaintiff again amended his petition by interlineation by adding the following words, to-wit: "and he has suffered and will suffer with deafness and with attacks of dizziness and semi-consciousness" (Admission of parties, Record, page —).

Plaintiff's said petition with its various amendments as is shown by admission of parties and record entries of said Circuit with the dates of the various amendments other than the substitution of defendant is as follows, to-wit, omitting caption and signature:

(NOTE.—The amended words are shown in italics with the date of amendment immediately following.)

Amended Petition.

In Circuit Court of Jackson County.

"Now comes plaintiff and for his cause of action against the defendant states that Walker D. Hines is now and at all times herein mentioned was director general of railroads, and as such in charge of and operating the Chicago Great Western Railroad and the Chicago Great Western Railroad Company, a corporation duly organized and existing according to law.

That the defendant is now and at all times herein mentioned was engaged in the operating of a line of steam railroads in the State of Missouri known as the Chicago Great Western Railroad, in-
18 cluding the tracks, train and cars hereinafter mentioned, as a common carrier of passengers for hire.

That the plaintiff is now and at all times herein mentioned was a citizen and resident of the State of Illinois.

That on or about the 3rd day of January, 1920, about the hour of 7:15 or 7:30 a. m. the plaintiff was a passenger on a southbound train of the defendant on the Chicago Great Western Railroad running southbound on the track of said railroad at a point near the town of Wyeth, in the State of Missouri. That plaintiff had paid his fare to the defendant for the privilege of riding on said train and was a passenger thereon in one of the coaches thereof. That while plaintiff was riding on said train as a passenger, said train as a result of negligence on the part of the defendant and the defendant's agents, servants and employes became derailed and left the track upon which it was running and a portion of the cars and coaches composing said train turned over, including, the coach in which plaintiff was riding, and said train came to an abrupt stop. That as a direct result of said occurrences the plaintiff was thrown against portions of the coach in which he was riding and as a direct result thereof he sustained the following servere, painful and permanent personal injuries:

He was bruised and injured upon his head, body and limbs. His left side, left hip and limb, left thigh, right ankle, foot and limb, *and his kidneys* (added by amendment, July 31, 1920), and the
19 bones, joints, muscles, nerves, ligaments and other tissues of said parts, and connected therewith were wrenched, sprained, bruised, lacerated and injured and the structures and functions thereof injured and impaired. His left ear and the left side of his face and head were lacerated, bruised and inflamed, *and he has suffered and will suffer with deafness and with attacks of dizziness and semi-consciousness* (added by amendment February —, 1921, within a week of trial). He suffered a profound shock and injury of his entire nervous system. That as a direct result of said injuries plaintiff has suffered and will suffer great physical pain and mental anguish, and has been and will be disabled from work, and has lost and will lose time from his occupation and earnings therefrom, and has suffered and will suffer an impairment of his earning capacity, and he has been and will be compelled to pay out and incur liability for sums of money for medical and surgical attention, and *he has lost weight and strength and* (added by amendment July 31, 1920) he has been and will be crippled and disabled and the structures and functions and usefulness of the injured parts aforesaid greatly impaired.

That all of said injuries and the results and effects thereof are permanent and lasting in their character and effect and the same directly resulted from the aforesaid negligence of the defendant, and the defendant's agents, servants and employees.

That by the word 'defendant' as hereinabove used is meant the said Walker D. Hines, Director General of Railroads, in charge of and operating Chicago, Great Western Railroad Company.

Plaintiff further states that the President of the United States by a proclamation dated March 11th, 1920, designated said Walker D. Hines, Director General of Railroads, as agent under Section 206 of the Transportation Act, 1920; and that thereafter said Walker D. Hines resigned as such Director General of Railroads and agent, and the President thereafter by proclamation appointed John Barton Payne, Director General of Railroads and agent designated under said section of said act, and he is now acting as such; and that said John Barton Payne, Director General of Railroads and agent designated by the President under said Transportation Act, is now by leave of court substituted as defendant herein in accordance with the provisions of said act (added by amendment February 25th, 1921).

That as a direct result of the facts aforesaid the plaintiff has been damaged in the sum of Fifteen Thousand Dollars ($15,000), (the amount originally stated was $15,000, which was amended to $3,000 on March 19, 1920, and again amended to $15,000 on November 16, 1920), for which sum with costs of suit plaintiff prays judgment against the defendant.

Journal Entries.

Thereafter and on February 28th, 1921, and during the January Term, 1921, of said court, this cause was assigned to Division No. 6 of said Circuit Court, and entry of record made thereof.

Thereafter and on February 28th, 1921, and during the said January Term, 1921 of said court, the trial of said cause was begun in said court, and in Division No. 6 thereof, and on said date said court made an entry of record as follows, to-wit:

"Now on this day comes plaintiff in person and by attorney, and defendant appears by attorney, and to try the issues herein joined come the following jury, to-wit: William Hunter, Rowland Wornall, Charles E. Felix, Fred Fransmathes, Bernis Richardson, Paul E. Gause, Harry O. Thomson, James W. Barr, Floyd R. Sharp, Alexander Morrison, F. E. Kreek, Richard W. Thomas, twelve good and lawful men from the body of the county, who were duly empaneled, tried and sworn, and the hour set for adjournment having arrived, the said jury is by the court allowed to separate under the usual charge until tomorrow morning at 9:30 o'clock."

Thereafter and on March 1st, 1921, and during the said January Term, 1921, of said court, and during the trial of this cause, the defendant filed in said court his motion for the appointment of a physician to make examination of plaintiff, which said motion is in words and figures, to-wit, omitting caption and signature:

Motion for Appointment of Physician and Order Overruling.

In Circuit Court of Jackson County.

Comes now the defendant and states that in consequence of the testimony introduced in the trial of this case by and on behalf of plaintiff regarding his alleged injuries, that the rights of the defendant and the defense of this cause require that a physician specialized and expert in the treatment of injuries and diseases of the ear and in proper diagnosis of conditions found in the ear be permitted and authorized to make a physical examination of plaintiff and report his findings to the court and jury, and that plaintiff be required to submit to such an examination.

22

Wherefore, defendant prays the court to appoint a physician so specialized to examine plaintiff and report the results thereof to the court and jury.

Thereafter and on the same day of said term, to-wit, March 1, 1921, the court overruled the defendant's motion for the appointment of a physician to make examination of plaintiff and made an entry of record thereof, to which said action of the court in overruling defendant's said motion, defendant then and there at the time duly excepted and still excepts.

Thereafter and on March 1st, 1921, during said January Term, 1921, of said court, and on the forty-second day thereof, the jury returned into court the following verdict, to-wit:

Verdict.

In Circuit Court of Jackson County.

"We, the undersigned jurors, find the issues for the plaintiff and do assess his damages at $5,000.00." (Signed) William Hunter. Rowland Wornall. Clarence E. Felix. Fred Fransmathes. Paul E. Gause. Harry O. Thomson. James W. Barr. Floyd R. Sharp. Alexander Morrison. F. E. Kreek.

23

And on the same day and during the same term of said court entered judgment in favor of plaintiff and against the defendant in the sum of $5,000.00 in words and figures as follows, to-wit:

Judgment.

In Circuit Court of Jackson County.

"Now on this day comes again the plaintiff in person and by attorney, and defendant appears by attorney, and come also the jury herein, and the said jury after hearing the evidence and the reading of the instructions by the court, and after hearing the arguments of counsel for the respective parties, retires to consider the same, and

after due deliberation return into court with the following verdict, to-wit:

We, the undersigned jurors, find the issues for the plaintiff and do assess his damages at $5,000.00. (Signed) William Hunter. Rowland Wornall. Clarence E. Felix. Fred Fransmathes. Paul E. Gause. Harry O. Thomson. James W. Barr. Floyd R. Sharp. Alexander Morrison. F. E. Kreek.

Wherefore, it is ordered and adjudged by the court that the plaintiff have of and from the said defendant the said sum of $5,000.00, together with the costs of this cause, and have therefor execution."

To which said action and ruling of the court, the defendant then and there duly excepted and still excepts.

24 **Journal Entries.**

And thereafter and on March 3rd, 1921, and during the January Term, 1921, of said court and on the forty-fourth day thereof and within four days from the return of said verdict, said defendant filed his motions for a new trial and in arrest of judgment, which said motions were marked filed by the clerk of said court and entered of record, said entries showing the filing thereof, which said motions for a new trial and in arrest of judgment are fully set out in the bill of exceptions herein, to which reference is hereby made, and which are here designated the same as though fully set out at this place.

Thereafter and on April 2nd, 1921, and during the March Term, 1921, of said court, said court overruled the defendant's motion for a new trial in said cause, and made an order thereof of record, to-wit:

"Defendant's motion for a new trial of this cause is by the court overruled, to which action and ruling of the court the said defendant excepts."

To which action and ruling of the court in overruling defendant's motion for a new trial the defendant then and there at the time duly excepted and still excepts.

Thereafter and on the same day of the same term of said court, defendant's motion in arrest of judgment was overruled by said court, and an order thereof made of record, to-wit:

"Defendant's motion in arrest of judgment is by the court overruled, to which action and ruling of the court the said defendant excepts."

25 To which action and ruling of the court in overruling defendant's motion in arrest of judgment, the defendant then and there at the time duly excepted and still excepts.

Thereafter and on May 4, 1921, and during the said March Term, 1921, of said court, and by agreement of parties, the court made an order of record substituting James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act 1920, for John Barton Payne, Director General and Agent aforesaid, resigned, which said order of record is as follows:

Order Substituting Parties Defendant.

In Circuit Court of Jackson County.

"Now on this 4th day of May, 1921, come the parties by attorneys and it appears to the court that since the date of the judgment herein John Barton Payne has resigned as Director General of Railroads and Agent designated by the President under Transportation Act 1920, and that the President has by Proclamation appointed James C. Davis Director General of Railroads and Agent, as aforesaid, and comes now said James C. Davis, Director General of Railroads and Agent, as aforesaid, by his attorneys and enters his appearance herein, and all of said parties do now in open court agree that he shall be substituted herein as defendant.

It is therefore by the court ordered that James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act 1920, be and he is hereby substituted as defendant in this cause and in the judgment rendered herein."

26 **Journal Entries.**

Thereafter, and on May 6th, 1921, and during the March Term, 1921, of said court, defendant filed in said court his affidavit and application for an appeal therein, which said application and affidavit were marked filed by the clerk of said court and entered of record, said entries showing the filing thereof, which said application and affidavit for appeal are fully set out in the bill of exceptions herein, to which reference is hereby made, and which are hereby designated as though fully set out at this place.

And on the same day of said term the court allowed the defendant's application for an appeal, and appeal was allowed herein to the Kansas City Court of Appeals, and the defendant was given to file his bill of exceptions herein until on or before the third day of the September Term, 1921.

Thereafter, and on September 12th, 1921, and on the first day of the September Term, 1921, of said court, and in due time the defendant presented to the said Circuit court its bill of exceptions in this cause in due and proper form, and prayed that the same be allowed, signed and filed in this cause and made a part of the record herein, and said bill of exceptions was signed by the judge of said court, and the court made an order of record finding that said bill of exceptions was correct, and ordered that the same be allowed and filed in this cause and made a part of the record herein, which was accordingly done, said bill of exceptions is as follows, to-wit:

27 **Bill of Exceptions on the Part of the Defendant.**

Be it remembered, that on Monday, the twenty-eighth day of February, 1921, the same being the forty-first day of the regular January Term, 1921, of said court, the above entitled cause came

n for trial, before Honorable Samuel A. Dew, judge of the Division No. six of said court, and a jury duly empaneled; the plaintiff appearing in person, and by Mr. William S. Hogsett, of Messrs. Hogsett & Boyle, and Mr. M. T. Prewitt, attorneys for plaintiff; and the defendant appearing by Mr. Roy B. Thomson, of Messrs. Warner, Dean, Langworthy, Thomas & Williams, and Mr. Charles P. Hough, attorneys for defendant.

Whereupon, the following proceedings were had, to-wit:

The Court: Gentlemen, at this time, I want to admonish you, that during any recess or adjournment of the cause, until you are finally sent to the jury room to decide this cause, you are not to discuss this case among yourselves, or with anyone else.

(Whereupon, the clerk swears witnesses, after which all witnesses except the plaintiff were excluded under the rule enforced by request of the respective counsel hereto.)

Thereupon, after opening statements have been made to the court and jury by attorneys, for the respective parties, the plaintiff, to sustain the issues on his behalf, introduced testimony, oral and documentary, as follows, to-wit:

Mrs. Margaret Erganbright, of lawful age, being called as a witness on behalf of the plaintiff, and having been first duly sworn, upon her oath testified as follows:

Direct examination by Mr. Hogsett:

Q. Will you please state your name to the court and jury?
A. Mrs. Margaret Erganbright.
Q. Where do you live, Mrs. Erganbright?
A. Well, in Kansas City, most of the time.
Q. And where have you lived here?
A. 3821 Prospect Avenue.
Q. Were you a passenger on a train operated by the defendant, on January 3, 1920, that became derailed, and wrecked?
A. Yes, sir.
Q. Near Wyeth, Missouri?
A. Yes, sir.
Q. Where did you board that train?
A. Minneapolis.
Q. Minnesota?
A. Minneapolis, Minnesota.
Q. And when was it—when did it arrive, when was it due to arrive at Kansas City?
A. Seven forty-five.
Q. In the morning or evening?
A. In the morning, in the morning.
Q. What was the time, approximately, when the train was wrecked near Wyeth?
A. Well, it was between seven ten and seven thirty, as near as I can remember.

29 Q. In the morning?
A. In the morning.
Q. Where is Wyeth, Missouri, with respect to Kansas City, how far away from Kansas City?
A. Well, I don't believe I would know the distance, but it would take about—would be about two hours and a half ride out, I think, or three (hours).
Q. Wyeth—is it north of St. Joe?

Mr. Thomson: Pardon me, may I interrupt you just a second, I want to make an objection.

(Whereupon the following proceedings were had out of the hearing of the jury:)

Mr. Thomson: Defendant objects to the introduction of any testimony in this case, for the reason that the petition shows, upon its face, that plaintiff was, at the time of the injury complained of, and at the time of the filing of the suit a resident of the State of Ilinois, and a non-resident of this state, and of this district, and that he charges that he received the injuries complained of at a location outside of this district, and outside of this county, in violation of, and under General Order 18-A, of the Director General of Railroads, this court is without jurisdiction to determine or try the issues in this case.

Mr. Hogsett: In answer to the suggestion of counsel for the defendant, I call the attention of the court to the fact that General Order No. 18-A is in direct conflict with the Act of Congress of March 21, 1918, which provides that actions at law may be brought against carriers, and judgments returned, as provided by law; that the Act of Congress antedated the so-called "General Order"
30 of the Director General of Railroads No. 18-A, the Act having been passed March 21, 1918, and the General Order 18-A having been issued of date some time near April, 1918. I call the court's further attention to the fact that it has been held by every court in the United States which has had occasion to pass on the matter, that the so-called Order No. 18-A is wholly and utterly void, because it is in conflict with the Act of Congress, herein referred to.

The Court: I will reserve my ruling at this time on that objection.

To which action and ruling of the court, the defendant, by its counsel, then and there at the time duly excepted, and still excepts.

(Whereupon, the following proceedings were had within the hearing of the jury:)

Mr. Hogsett:

Q. Read the last question and answer.

(Whereupon the last question was duly read by the stenographer.)

The Witnes-: Yes sir.

Q. So you were due in Kansas City, some time around seven-thirty, or seven forty-five, and the wreck occurred at seven-thirty, and you were still north of St. Joe?

A. Yes, sir.

Q. About how late was the train at the time of the wreck?

A. Well, I don't know that I could say how late. It must have been two hours and a half, anyway.

Q. Mrs. Erganbright, in what part of the train were you riding?

A. In the rear.

31 Q. Were you in a Pullman Sleeper, or in a coach?

A. In a Pullman.

Q. At the time the wreck occurred, were you up, or were you in your berth?

A. I was in the berth.

Q. Were you awake?

A. Yes, sir.

Q. State what, if anything, first attracted your attention to there being anything unusual in the operation of the train?

A. The first thing I noticed was the speed of the train, that I——

Q. (Interrupting.) Was the speed unusual, in any particular?

A. Yes, sir.

Q. Unusual, in that it was faster than usual?

A. Faster.

Q. Or slower than usual?

A. Faster.

Q. Was any comment made, at the time, about that, by you and the lady, Mrs. Brock, who was with you?

A. Well, I said something to her about it, that I thought the train was running fast, and I couldn't understand what was wrong.

Q. How long after your attention was arrested by the unusual speed of the train, was it that it left the track?

A. Oh, just about—oh, a short time, maybe fifteen minutes, or maybe not that long.

Q. Now, in your own way, Mrs. Erganbright, just describe to the jury what occurred there after the derailment occurred—as the derailment occurred, and what you saw afterwards, after you got out?

A. Well, of course, I was nervous, and I could hardly get dressed. We weren't dressed, and I got out as soon as I could, and we had to be helped down by someone—I don't know who helped 32 us down—and when we went outside, we saw the coaches all off the tracks, some of them had rolled down the embankment.

Q. Did this derailment occur on an embankment, where the track was high, or on a level with the surrounding country?

A. It was on an embankment.

Q. Now, before the cars began turning over, did you experience anything that indicated that your car was off the rails, and running on the ties?

A. Yes, sir; I looked out of the window, and I said to the lady

in the berth with me, I said, "What is the matter with the train? It is off the track."

Mr. Thomson: Just a minute. I presume Mr. Hogsett is not inquiring for the conversation?

Mr. Hogsett: No; just what you experienced.

A. Well, it was off the track.

Q. Now, did you dress and go out later?

A. Yes, sir.

Q. By the way, was your Pullman coach thrown down the bank, or not?

A. No, sir.

Q. It remained on the embankment, did it?

A. It was off the track, yes, sir.

Q. But, off the track?

A. Yes, sir.

Q. Was it right side up?

A. Yes, sir.

Q. It was on its wheels?

A. Yes, sir.

Q. Now, did you see the other cars and coaches, and situation generally, during the hours you remained there, after the wreck?

A. Well, I did, I guess, in a way, I looked them over, but—

Q. (Interrupting.) Now, I want to show you six postal
33 card photographs, which the reporter will mark Exhibits "1" to "6," inclusive (handing said postal cards to the reporter).

(Whereupon, the said postal cards, so asked to be marked by counsel, were duly marked Exhibits "1" to "6," both inclusive, by the stenographer for identification, and returned to Mr. Hogsett.)

Mr. Hogsett:

Q. And I will ask you to look at these photographs, and state whether they show the train in question, as it appeared after the wreck (handing said photographs to Mr. Thomson).

Mr. Thomson:

Q. Mrs. Erganbright—(to Mr. Hogsett): If I may ask a question about them?

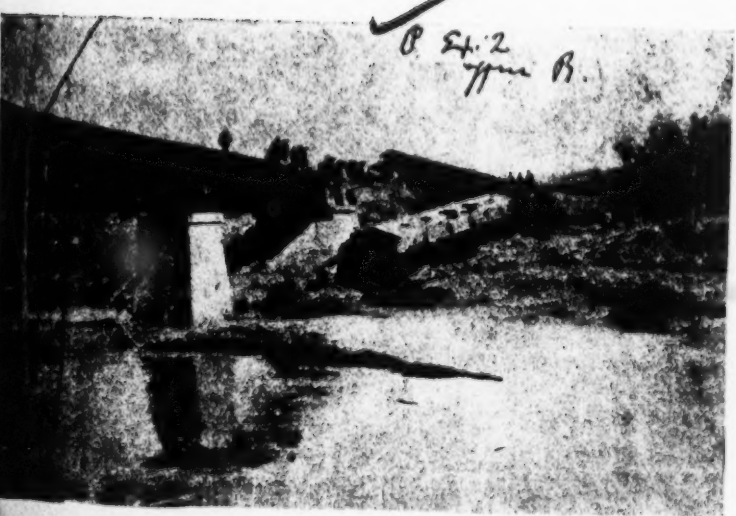
Mr. Hogsett: Yes.

Mr. Thomson:

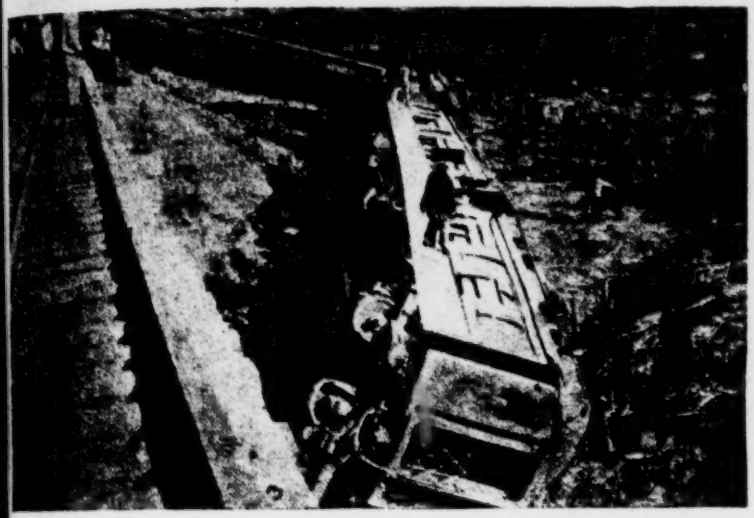
Q. Mrs. Erganbright, are you sufficiently and definitely acquainted with the condition there, to be able to state whether that condition, or those conditions that existed at that time, were accurately, or not, depicted by the photographs?

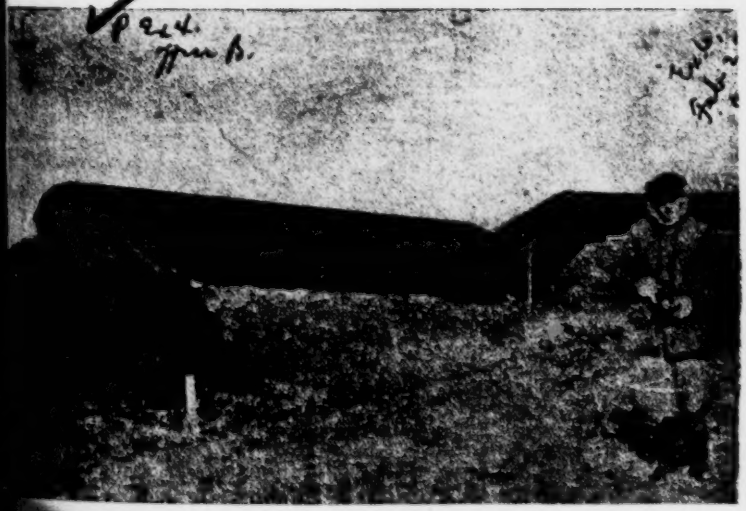


P Et. 1
Yprs B.



P Et. 2
Yprs B.











The Witness:

A. You mean, pictured in my mind?

Mr. Thomson:

Q. Yes, ma'am.

The Witness:

A. Yes, sir; I think so.

Mr. Thomson:

Q. Would you think you are sufficiently acquainted with it, to be able to tell, from the appearance of the photograph, whether it truly depicted the condition there?
A. Yes, sir; I do.

(Whereupon Mr. Thomson hands Exhibits "1" to "6" to the witness.)

Mr. Hogsett:

Q. Now, you may look at these photographs, and state to
34 the jury whether they accurately show the situation, as it existed there after the wreck, immediately after the wreck?
A. Yes; I remember all of those.
Q. Do they?
A. Yes, sir.
Q. Do they accurately?
A. Yes, sir, they are familiar to me.

Mr. Hogsett: I offer Exhibits "1" to "6," inclusive, in evidence.

(Whereupon, Exhibits "1" to "6," both inclusive, so offered by counsel for the plaintiff, were duly received in evidence, without objection, and true and correct copies thereof, are hereto attached, and made a part of the testimony of this witness.)

(Here follow Exhibits 1 to 6, both inclusive, marked side folio pages 34*a*, 34*b*, and 34*c*.)

35 (Whereupon Mr. Hogsett passes said Exhibits "1" to "6" to the Jury for examination.)

Mr. Hogsett (to the jury): Will you just pass those, one at a time? I would like to have the jury see them.
The Court: Let the record show the court overruled the objection on the part of the counsel of the defendant, to the introduction of testimony.

To which action and ruling of the court, the defendant, by its counsel, at the time then and there duly excepted, and still excepts.

Mr. Hogsett:

Q. Mrs. Erganbright, did any of this train remain on the track at all?

A. No, sir, I don't think any of them (the coaches) did, unless it was the observation car, that was back of my coach.

Q. Now, I notice a picture here, shown by Exhibits "4," "5" and "6," a car lying out in what looks like a cornfield, on its side, with the wheels and running gear entirely stripped off (indicating)?

A. Yes, sir.

Q. Which car was that, do you know?

A. Do you mean the number?

Q. No, whether it was a chair car, or a Pullman, or a baggage car, or what?

A. Well, I really couldn't say.

Q. You don't know?

A. No, I don't know.

Q. All right. But, there was such a car there, with the wheels entirely stripped off?

A. Yes, sir, but I don't know which it was.

Q. But you don't know which it was?

A. No, sir.

36 Q. And, lying about how far, would you say, from the track?

A. Well, I am not very good at guessing the distance. I know it went as far as it could.

Mr. Hogsett:

Q. Can you give an idea in the room here, some estimate of distance, in that way?

A. Well, it would be back as far as those seats (indicating seats in back of courtroom).

Q. Back as far as the seats, behind the rail there (indicating rail in courtroom)?

A. Yes, sir, that would be my judgment.

Q. It was that far from the track, where this car was lying on its side?

A. Yes, sir.

Q. Now, can you give the jury some estimate of the height of the embankment, down which this car rolled?

A. I don't believe I could.

Q. You can't estimate that in feet?

A. I don't believe I could, conscientiously.

Mr. Hogsett: All right.

Mr. Hogsett: You may examine?

Cross-examination by Mr. Thomson:

Q. Mrs. Erganbright, have you any suit or claim pending, growing out of this injury?

A. No, sir, I haven't now.

Q. How?
A. I haven't.
Q. Did you make a claim?
A. Yes, sir, they settled out of court.
Q. Satisfactorily?
A. Yes, sir.

Mr. Hogsett: I object to that, as immaterial.

The Witness:

A. Yes, sir.

The Court: Overruled.
37 Mr. Thomson: That is all.
Mr. Hogsett: That is all.

(Witness excused.)

Mrs. CARRIE BROCK, of lawful age, being called as a witness on behalf of the plaintiff, and having been first duly sworn, upon her oath testified as follows:

Direct examination by Mr. Hogsett:

Q. State your name to the court and jury?
A. Carrie Brock.
Q. Where do you live, Mr. Brock?
A. 4445 Tracy.
Q. In Kansas City?
A. In Kansas City.
Q. Were you a passenger on a train, operated by the defendant, on the morning of January 3, 1920?
A. I was.
Q. (Continuing:) When it became derailed near Wyeth, Missouri?
A. I was.
Q. With whom were you on the train?
A. With Mrs. Erganbright.
Q. The lady who just left the stand?
A. Yes, sir.
Q. And were you and she in the same Pullman berth?
A. Yes, sir.
Q. And, where had you boarded the train?
A. At Minneapolis, Minnesota.
Q. And, were coming here?
A. To Kansas City.
Q. Now, you heard her testimony, in regard to the train
38 being late; about how late was it, in your judgment?
A. About two hours and forty-five minutes.
Q. Did you get that information from somebody on the train?
A. From the porter.
Q. From the porter?
A. Yes, sir.

Q. Mrs. Brock, did you notice anything unusual in the operation of this train, before the derailment occurred?

A. Yes, I did.

Q. And state what that was, please?

A. Well, it seemed—it seemed to give a lurch—it seemed to be going so fast, she (Mrs. Erganbright) remarked——

Mr. Thomson (interrupting): Don't tell what you remarked.

Mr. Hogsett: Don't tell what you remarked—but what——

A. (Interrupting.) All right.

Mr. Hogsett (continuing):

Q. But tell your experience—you say it seemed to be going so fast——

A. (Interrupting.) Yes, sir.

Q. (Continuing:) Did it seem to be going unusually fast?

A. Yes, sir, it did.

Q. Was it going that way, before it left the track?

A. Well, yes.

Q. And then, how soon after your attention was attracted to the unusual speed, was it that you felt your car bumping along on the rails?

A. Just a few minutes—I couldn't say the time—but just a few minutes.

Q. Now, did you later dress and go out to see what the conditions were?

A. Yes, sir.

39 Q. And, you have seen these photographs in my office, I believe?

A. Yes, sir.

Q. And, you may look at them again and see if you identify those as accurate pictures of the situation, as you saw it, when you got out and looked it over? (Handing Exhibits "1" to "6," both inclusive, to the witness): Are they correct pictures of the scene?

A. They certainly look like it, yes, sir.

Mr. Hogsett:

Q. Mrs. Brock, do you know which that car was, that is on its side there, in the corn field, near the fence?

A. That is the chair car.

Q. The one shown by Exhibits "4" and "5"?

A. Yes, sir.

Q. And, what would be your judgment of the height of the embankment, from which that car was thrown?

A. Well, I don't know exactly, but I would judge it would be about fifteen feet.

Q. Yes. And what would be your judgment of the distance that car was rolled from the track, and down that fifteen foot embankment?

A. It was quite a little distance.

Q. Can you estimate that?
A. I would judge that would be about fifteen feet, from the difference—at the bottom.
Q. Yes. Well, it seems to be lying there about in line with the fence, between the right of way, and that corn field down there?
A. Yes, sir.
Q. And, whatever it would be, it would be approximately half the width of the right of way?
A. Yes.
40 Q. I will get it in that way: You have testified that the speed of the train seemed to be unusually fast, before the derailment occurred? Can you give an impression to the jury of how fast the train was running, before the derailment occurred?
A. Well, I really couldn't say.
Mr. Thomson: Wait just a minute, Mrs. Brock, please. If Your Honor please, I think this lady has not shown herself qualified to testify as to the rate the train was moving.
Mr. Hogsett: I will prove that another way—that is all.

Cross-examination by Mr. Thomson:

Q. Mrs. Brock, how many cars were there on that train, do you know?
A. Well, there was the chair car, that got across the river, and then there was, I think three of the Pullmans, that went over.
Q. Well, I mean in the whole train?
A. In the whole train?
Q. Yes, how many cars were there in the train?
A. Well, I couldn't say.
Q. Well, do you remember how many Pullman Coaches there were?
A. Well, I believe there were four.
Q. Do you remember how many chair cars there were?
A. There was the one, I think.
Q. Have you a claim pending against the director general?
A. No, sir.
Q. How?
A. No, I haven't.
Q. Did you make a claim?
A. Yes, sir.
41 Q. What happened to it?
A. It was settled out of court.

Mr. Thomson: That is all.

Redirect examination by Mr. Hogsett:

Q. You and Mrs. Erganbright both had to bring suit, before settlement was made?
A. Yes, sir

Mr. Hogsett: That is all.

Recross examination by Mr. Thomson:

Q. Mrs. Brock, you say you had to bring suit before settlement was made?
A. Yes, sir.
Q. To whom did you talk about this, in regard to settling except your attorney, about bringing suit?
A. Well, I didn't talk with anybody.
Q. So, the first communication you made about this, was with your attorney, to file suit, wasn't it?
A. Yes, I believe so.

Mr. Thomson: That is all.
Mr. Hogsett: That is all.

(Witness excused).

GEORGE WECHSLER, the plaintiff in said cause, of lawful age, being called as a witness in his own behalf, having been first duly sworn upon his oath testified as follows:

Direct examination by Mr. Hogsett:

Q. State your name to the court and jury, please?
A. George Wechsler.
Q. How old are you?
A. Twenty-four.
Q. You are the plaintiff in this case?
A. Yes, sir.
42 Q. Where do you live.
A. Prairieville, Illinois.
Q. What is your occupation?
A. Running a small garage, supply shop.
Q. How big a town is Prairieville?
A. About two hundred.
Q. You were injured in a train wreck—what was the date of that?
A. January 3, 1920.
Q. And what time of the day did it occur?
A. Some time in the morning.
Q. And where did it occur?
A. North of Wyeth, Missouri.
Q. On what road?
A. Chicago & Great Western.
Q. Which was was the train bound—north or south?
A. South.
Q. Were you a passenger on the train?
A. Yes, sir.
Q. Where had you bought your ticket?
A. At Sterling, Illinois.
Q. And from Sterling to what point?
A. Marshalltown—to Kansas City, Missouri.
Q. How did you come, from Sterling?

A. To Marshalltown, Iowa.
Q. And, over what road?
A. The Northwestern.
Q. And, you took a Great Western, at Marshalltown?
A. Yes, sir.
Q. This is the Chicago, Great Western Railroad?
A. Yes, sir.
Q. From Marshalltown, to Kansas City?
A. Yes, sir.

43 *Q.* Now, it may be admitted, may it not, Mr. Thomson, that Walker D. Hines, Director General of Railroads, at the time in question, was operating the train in question of the Chicago Great Western Railroad?

Mr. Thompson: I think that can rest on the presumptions, whatever they are, that is the presumption.

Mr. Hogsett:

Q. What time did you leave Marshalltown?
A. About eleven o'clock in the evening.
Q. When was your train due to leave?
A. A little after nine.
Q. So you left two hours late?
A. Yes, sir.
Q. When were you due to arrive in Kansas City?
A. Somewhere around seven thirty or seven forty-five.
Q. Now, how close was this to Wyeth, where this accident occurred?
A. I was told it was about five or six miles.
Q. At the time of the wreck, how late were you?
A. About three hours.
Q. Mr. Wechsler, where were you seated in the train?
A. I was in the chair car.
Q. And, whereabouts in the car—on the right or left side of your car?
A. On the left side.
Q. Were you with anyone?
A. Yes, sir.
Q. With whom?
A. With my brother.
Q. Were you next to the window or next to the aisle?
A. Next to the window.
Q. Now, in your own way, tell what you first observed, that attracted your attention to anything unusual in the operation of the train?

44 A. Well, I had awoke probably a half hour before that, and had straightened up my chair, so that I would be sitting up, and I had noticed, at that time, that the train was traveling awful fast, and it was coming around a curve, and it wasn't but a few minutes until we were off the track, and bumping along on the ties, and it wasn't but a few seconds after that, until we rolled over into the ditch.

Minnesota State ... St. Paul, Minn.

Q. Have you ridden in automobiles, and in that way learned something about how to estimate speed of a train, on which you might be riding?

A. Yes, sir.

Q. Give the jury your best judgment, as to the speed at which that train was running, at the time your attention was attracted by the speed, and at the time it left the -rack?

Mr. Thomson: Just a moment, if the court please: If I may ask a question:

Mr. Thomson:

Q. What kind of an automobile have you operated, and did you operate before that time?

A. I drove a Ford myself.

Mr. Thomson:

Q. Any other kind?

A. No, sir.

Mr. Thomson:

Q. I object to the witness's testimony in trying to qualify by that experience, to determine the speed of a train.

Mr. Hogsett:

Q. Of course, a man don't have to be riding sixty miles an hour to be able to judge. He can be going at thirty miles an hour, and would be able to judge one going twice as fast, as going sixty.

Q. When you finally wound up, your car—where was it—how far from the track?

A. About thirty-five or forty feet.

Q. Was there any part of the train left on the track, after
45 the wreck was over?

A. I don't know, I didn't go back to the rear end of the train.

Q. About how high was the embankment, down which the train rolled, or part of it?

A. About twenty-five feet.

Q. These six pictures, are your pictures, are they not?

A. Yes. sir.

Q. By the way, how did you get those (indicating Exhibits "1" to "6," inclusive)?

A. I got them from a photographer in St. Joseph, Missouri.

Q. How did he get your name, do you know?

A. He——

Q. (Interrupting and continuing:) —how did you first hear from him?

A. He wrote to me, and he said he had saw my name in the paper.

Q. They are just postal card photographs, made by some enterprising photographer up there?

A. Yes, sir.

Q. Are they correct pictures of the wreck, as it was, immediately after it occurred?

A. Yes, sir.

Q. Now, pick out of those pictures, the ones that show your car, and the position of it (handing Exhibits "1" to "6" to the witness, who picks out a photograph desired, and hands same to Mr. Hogsett).

Mr. Hogsett:

Q. You have handed me Exhibits "4" and "5"; do those pictures show the chair car?

A. Yes, sir.

Q. Now, I notice from Exhibit "5," which shows the underside of the car, that the entire running-gear, as well as wheels, springs, and everything except the coach proper, is stripped off—is that the way it was?

A. Yes, sir.

Q. I notice from Exhibit "4," there is a part of the running gear—one of the trucks, at least, is over in the corn field, beyond the car—is that the way it was?

A. Yes, sir.

Q. How many times did the chair car turn over, in rolling down that embankment, and over into that field?

A. Once, completely over, and the second time on its side.

Q. That would be one and one-half times, or possibly one and three-quarters revolutions?

A. Yes, sir.

Q. What was the condition of the inside of the car, the chair car. I mean, after the wreck, with regard to the effect on the seats, and other attachments of the car?

A. It was generally broken up. The windows were broken out of the coach, and some the chairs were just torn loose from the floor.

Q. Now, while this train, this car was rolling down the embankment, what happened to you?

A. We were being thrown from side to side, and all over the inside of the coach.

Q. What injuries did you receive?

A. I was cut by glass above, on the left ankle; I was also cut on the left thigh. I was struck about the left hip, and I was cut on the head, above the left ear, and a little back.

Q. Point out the place on your head, where the blow was received?

A. About in there (indicating left side of head).

Q. You are indicating a point how far above the left ear?

A. About three inches.

Q. And, about how far back of the left ear?

A. About an inch back.

Q. How a long a cut place was there there, if you know?

A. I was told it was about two inches long.

Q. Were you conscious or unconscious, immediately after this wreck?

A. I was unconscious.

Q. Do you know what—have you any way of estimating, or judging, how long you were unconscious?

A. It was probably about five minutes—I don't know for sure.

Q. When you came to yourself, what was being done with you, or for you, or by you—what was occurring, in other words?

A. We were being helped out.

The Court: I expect we had better adjourn. The jury will return at two o'clock.

(Whereupon the hour of noon having arrived, an adjournment was had until the hour of two o'clock P. M. of this day, at which time came again the parties, and the jury having resumed their seats in the jury box, the following proceedings were duly had:)

GEORGE WECHSLER, the plaintiff in said cause, having been heretofore duly produced, sworn and examined, on his own behalf, resumed the stand pursuant to adjournment, and testified as follows:

Further direct examination by Mr. Hogsett:

Q. Whereabouts in the train, or out of the car, were you taken, Mr. Wechsler?

A. Out through the front end, through the door.

48 Q. Describe to the jury the place where the cut appeared on your ankle—whereabouts was that?

A. Just above, on the left ankle, just above the shoe.

Q. And whereabouts was it you received the blow in the back, you spoke of?

A. Just above the left hip.

Q. On which side of the back—the right or left?

A. On the left side.

Q. You spoke of receiving a cut on your leg—whereabouts was that?

A. That was on the thigh.

Q. Below or above on the top of the leg—that is, forward or back?

A. About half way between the front and the back.

Q. Mr. Wechsler, how long was it before the train brought you to Kansas City—that is, the special train that was made up afterwards—when did you arrive in Kansas City?

A. About seven o'clock that evening.

Q. And, when you got here, where did you go?

A. To the Rahe School.

Q. How far is that from the Union Station?

A. About two blocks.

Q. And how did you get there?

A. In a Shaw taxi.

Q. And how long were you in the Rahe School?

A. Six weeks.

Q. How long were you there that evening?

A. About fifteen minutes.

Q. What was the purpose of your being there—why were you there—what were you doing?

A. We enrolled, and arranged about the tuition fees.

49 Q. Did they send you to where their boarding house was, that night?

A. They took us there.

Q. They took you there?

A. Yes, sir.

Q. How were you taken?

A. In a car (automobile).

Q. And, where were you taken?

A. 2432 Troost?

Q. What time did you arrive there?

A. About a quarter of eight.

Q. What was done for you, if anything?

A. We were assigned to our rooms, and we were supplied with salves, and we were helped to clean our wounds, and to bind them up.

Q. And who helped you do that?

A. The lady of the house.

Q. The lady that kept the boarding house?

A. Yes, sir.

Q. Now, when did you see a doctor?

A. The next day.

Q. And, who called the doctor?

A. The lady of the house, where we were staying.

Q. What was his name, Mr. Wechsler?

A. Doctor Bleil.

Q. Just describe in your own way, what was the nature of the treatment he gave you?

A. He bandaged up the wounds, and he bandaged up my back—put liniment on it, and bandaged it up, so that it would keep the air away from it, and the bandage on my leg, that I had tied up, he took that off, and cleaned it out, and bandaged that up, and he told me that I was to keep on keeping that clean and putting salves on.

Q. You spoke of his strapping your back—what was the

50 appearance of your back, as you understood it—I don't know whether you could see it—was it bruised and cut, or lacerated—just describe that in detail.

A. It was bruised.

Q. At that point, there was no cut?

A. No, sir.

Q. How long were you under this doctor's care?

A. Until we left Kansas City.

Q. And what was his name?

A. Doctor Bleil.

Q. Bleil?

A. Yes, sir.

Q. And you were in Kansas City how many weeks?

A. Six weeks.

Q. How frequently did Doctor Bleil see you, and treat you?

A. He saw us once a day for the first week, and after that, he was

called in two or three times—two or three times a week, until the latter part of the six weeks, we went to his office.

Q. By the way, did he take a sample of your urine, at any time?

A. Yes, sir.

Q. Do you know how many times he took a sample of your urine?

A. Twice.

Q. Twice?

A. Yes, sir.

Q. Now, when was it you finished your course at the Rahe School—about the date of that?

A. About the thirteenth or fourteenth of February, 1920.

Q. That would make six weeks' course, then, you took there?

A. Yes, sir.

Q. What part of that time did you miss, if any?

A. About a week, altogether.

51 Q. Was that all at once, or at different times, during the six weeks?

A. At different times.

Q. Now, just describe your condition, while you were here, and while you were under Doctor Bleil's care—describe it in your own way.

A. It was the blow that I received above my hip, it pained me, and I could hardly stoop over to lace my shoes in the morning, and it bothered me in walking; I couldn't hardly get back and forth to school, but Doctor Bleil advised me, if I could possibly do it, I should keep moving; I should go down to the school so that I could get the exercise going back and forth; but I wasn't to do any work there, and he said in that way I could leave my——

Mr. Thomson (interrupting): Just a moment, I object to the conversation with the physician.

Mr. Hogsett: All right, we will not present that part of it.

Q. Just eliminate the conversation with the doctor, and state what you did, and what your condition was, during the six weeks—just continue with your statement.

A. I went down to the school, so as to keep moving around, and getting exercise, and I couldn't do any work there; I had to look on, and get most of it out of the work, what the other fellows done, and part of the time I wasn't able to be there at all, on account of it being——

Q. (Interrupting.) Now, you speak of not being able to do the work—what kind of work are the students supposed to do?

A. Well, there isn't, you might say, real heavy work, but it is mostly testing, and getting under the cars, in different ways.

52 Q. Learning how they are made underneath?

A. Yes, sir.

Q. Taking cars apart, and putting them together, and different work?

A. Yes, sir.

Q. Now, Mr. Wechsler, did you do that work, or did you simply get what instruction you received from observation?

A. I had to get what I could by looking on.

Q. After the six weeks' time, that you were here, where did you then go?

A. Back to Sterling, Illinois.

Q. Your mother and father live there, do they not, on a farm?

A. Yes, sir.

Q. Now, in your own way, I want you to describe to the jury your condition, since that time, since your return home, and up to the present time—in what way your injuries affect you?

A. Why, I have been able to get around since that time, but there is different times that my hip bothers me. I can't walk the way I should. Sometimes I can't walk without limping; in doing any heavy work, in stooping, stooping over, to lift anything, I can't do it, on account of my hip. I haven't got the strength there I used to have.

Q. In what way does that hip and limb bother you—how is it? What is the sensation in it?

A. It has a dead sensation, from the hip on down to the knee, as though it was partly paralyzed, or a dead feeling.

Q. Is that a sensation merely—you actually do have use of the limb, do you?

A. Yes, sir.

53 Q. But that is the way it feels to you?

A. Yes, sir.

Q. Did you ever have any pain, of any kind, in the use of your limb or hip, before you were injured in this wreck?

A. No, sir.

Q. Now, what about you—the condition of the head, since your return from Kansas City?

A. That has left me—that causes dizzy spells, and it comes on—when it comes on, I have got to support myself. It leaves me in a semi-conscious condition. I don't get unconscious altogether. I still know what is going on, and things seem to swim, where I am, around me, and I have to sit down where I am, and it leaves me with a dull headache, a dull pain over the eyes, and back of the eyes.

Q. Mr. Wechsler, did you ever have anything like that before this injury?

A. No, sir.

Q. And, when do those attacks—when did those attacks we will call them for want of a better name, begin?

A. About three months afterwards.

Q. About three months after the injury?

A. Yes, sir.

Q. Prior to that, had you ever had anything like that, resembling that in your life?

A. No, sir.

Q. How long do these spells last?

A. They last about ten or fifteen minutes, and the headache that is left after that, lasts something, from two to three hours, to half a day.

Q. How frequently have you had them?

A. From once a week to two or three times a week.

54 Q. What is the fact, with respect to their frequency, now, as compared with when you first experienced them, when they first began?

A. They are more frequent.

Q. You say Doctor Bleil took a sample of the urine, on two occasions?

A. Yes, sir.

Q. Did he prescribe any medicine for you to take, for any trouble with your urine?

A. Yes, sir.

Q. What was it, and what was the trouble you had?

A. Well, I would have to pass water more frequently, more freely than what I used to, and it would bother me in the night, so that I would have to get up two or three times in the night.

Q. Had you ever had any experience or trouble of that kind before your injury?

A. No, sir.

Q. How long did you continue to use the medicine prescribed for that trouble?

A. I have used it till about a week ago.

Q. Up till a week ago?

A. Yes, sir.

Q. Are you still affected by that condition?

A. Yes, sir.

Q. What was your normal weight, at the time you were hurt?

A. One hundred and sixty-eight.

Q. What do you weigh now?

A. About one hundred and forty-eight and one-half.

Q. Have you weighed recently?

A. Yes, sir.

Q. When?

A. Yesterday.

Q. You are now approximately twenty pounds under your normal weight?

A. Yes, sir.

Q. Was there any greater decrease in weight than that,

55 at any time following your injuries—if so, state the extent of it.

A. I dropped down to one hundred and forty-two pounds.

Q. And, at what point was it, in the progress of your case, after the injury, how long after?

A. About four or five days afterwards.

Q. Now, about this injury to your ankle—has that recovered?

A. Yes, sir.

Q. You have no trouble with that?

A. No, sir.

Q. And the cut on your leg—what is the fact regarding that?

A. That has healed up.

Q. Has that left you with any trouble?

A. No, sir.
Q. By the way, is there a scar there, where it was cut?
A. Yes, sir.
Q. (Continuing.) —was healed?
A. Yes, sir.
Q. About how long is that?
A. About an inch and a half, or two inches long.
Q. And how deep was that cut?
A. That was about a quarter of an inch deep.
Q. Mr. Wechsler, have you had any—aside from these spells that you have testified about, have you had any nervous, any nervous disorder of any kind, other than that—since this injury—particularly in respect to riding on trains or in any kind of vehicle?
A. Yes, sir.
Q. Now, tell the jury what that is, and what your experience is in that regard.
A. It has left me with a nervous feeling whenever I ride on a train, or anything like that. Whenever it bumps or jars any, why it just keeps my nerves on edge—keeps my nerves on edge all
56 the time, and it has left the feeling that as long as I am on the train, that I don't feel safe.
Q. Did you ever have any fear of that kind, any childish fear of that kind, before these injuries?
A. No, sir.

Mr. Hogsett: You may examine.

Cross-examination by Mr. Thomson:

Q. Do you have now, what Mr. Hogsett calls a "childish fear" of riding on a train?
A. Yes, sir.
Q. Your accident occurred about what time of the day?
A. About seven-thirty in the morning.
Q. And you remained there at the place of the accident, how long?
A. Until one o'clock.
Q. That was the second train that left from that place?
A. Yes, sir.
Q. (Continuing:) —to St. Joseph?
A. Yes, sir.
Q. You went from there to St. Joseph?
A. Yes, sir.
Q. How did you spend your time, now, between the time you were hurt, and one o'clock, when you left?
A. In—Well, we were limping around there a part of the time—part of the time was spent at the fire, and sitting on our suit cases, and staying around the scene of the wreck.
Q. Isn't it a fact that there was a fire there, and that you stood around the fire for a half hour, or longer, and then got a seat and sat down by the fire, and sat there awhile, and then got up and walked around awhile?

A. Yes, sir; and I limped around, and I would sit down awhile.

57 Q. And you stood up for a half hour before you got a seat and sat down at all, didn't you?

A. No, sir.

Q. How long was it?

A. I don't know, I didn't keep any track of the time.

Q. Well, what would you say as to whether it was an hour, a half hour you stood up, before you got a seat, to sit down?

A. I wouldn't say it was as long as a half hour, because I wasn't able to.

Q. Your deposition was taken in this case, wasn't it?

A. Yes, sir.

Q. I will ask you if these questions were asked you and these answers given, on page fifteen of your deposition (reading): "Q. Where did you go as soon as you got out from the train? A. We stayed around there; stayed right there until they took us away from there later in the day." That question was asked and that answer given, wasn't it?

A. Yes, sir.

Q. (Continuing reading:) "Q. In a train—in another train that was brought on? A. Yes, sir. Q. When did that arrive? A. The train I left on left there at one o'clock?" That is correct?

A. Yes, sir.

"Q. You say you stayed around there. What did you do just as soon as you got out of the wreck, where did you go? A. Stayed right around the coach there, and didn't have any place to go; some of the passengers had built a fire along the track there to keep warm, and we stayed around there." That is correct, isn't it?

A. Yes, sir.

Q. (Continuing reading:) "Q. Were you able to stand and walk around there, were you? A. I was for a little while, but a

58 little while after that I would have to sit down. J. Well, how long did you stand and walk around there, and stand around the fire before you sat down? A. Probably about half an hour." Was that question asked, and that answer given?

A. Yes, sir.

Q. And, that is correct?

A. I wouldn't say that it was a half hour.

Q. Well, why did you say it when your deposition was taken?

A. I said "about a half hour."

Q. Is that what you say now?

A. Yes, sir.

Q. Well, were these questions asked you, and these answers given: "Q. Then you sat down for how long? A. I don't know just how long I did. Q. Well, after sitting down a while you got up again and stood and walked around, did you? A. It was really too cold not to keep moving. Q. Was there anything there for you to do; assist anybody else there that was more seriously hurt? A. There was enough other ones there that came in, the neighbors, around,

and helped." Was that question asked, and that answer given—those questions asked, and those answers given?

A. Yes, sir.

Q. How many people were there, doctors and nurses, and others assisting anybody that needed assistance?

A. I would say there was around eight or ten, I don't know for sure.

Q. How many doctors would you say were there?

A. Well, that is counting doctors—just doctors. I didn't see any nurses.

Q. You say you think there were eight or ten, was the way you remember it?

A. Yes, sir; I think so.

59 Q. Did you communicate with any of those doctors, and request assistance from them?

A. Not from a doctor.

Q. You say you didn't see any nurses?

A. No, sir.

Q. How many of you were around, standing and sitting around this fire?

A. I don't know.

Q. Well, give us an idea of what you think about that?

A. Well, there was probably fifteen, twenty, twenty-five. They would keep getting up, and they would walk away again.

Q. Now, what time did you reach St. Joseph, Missouri?

A. About two o'clock, or two-thirty?

Q. Two or two-thirty in the afternoon?

A. Yes, sir.

Q. Was there anybody on that train that went from near Wyeth, to St. Joseph, to see if anybody needed anything?

A. I don't know.

Q. Did you make any inquiry to find out?

A. No, sir.

Q. Then, how long did you stay in St. Joseph?

A. Until about five o'clock that evening.

Q. You ate a meal there, I believe?

A. Yes, sir.

Q. Did some railroad representative make arrangements for you about the meal there?

A. Yes, sir.

Q. Did you talk with him, or hear about that?

A. No, sir.

Q. (Continuing:) Hear the invitation?

A. No, sir.

60 Q. (Continuing:) —to go in and have this meal?

A. I heard the invitation.

Q. And where did you eat, in the station?

A. Yes, sir.

Q. Did you communicate with this person, whoever it was, that extended the invitation, indicating that you needed any assistance of any kind?

A. No, sir.
Q. You have lived for some years in Illinois?
A. Yes, sir.
Q. You live there now, you say?
A. Yes, sir.
Q. How frequently had you been to Kansas City before this trip?
A. That was the only time.
Q. Now, the station at which you arrived in Kansas City, the track level is below the level of the station proper, isn't it?
A. Yes, sir.
Q. And how did you get from the train, up to the station?
A. Walked up, the best I could.
Q. Well, that is the way you always walk up the steps, or down the steps, isn't it—everybody else does that?
A. Not always, because we went up with difficulty.
Q. What baggage did you have?
A. Had a suit case apiece.
Q. Well, who carried your suit case?
A. I did.
Q. Then, you say, you went from the station over to the Rahe Automobile School?
A. Yes, sir.
Q. Who did you see there?
A. I don't know——
Q. (Interrupting and continuing:) —the man in charge?
A. Yes, sir; the man in charge.
Q. And, you completed your arrangement then, about
61 taking the automobile training course there, did you?
A. Yes, sir.
Q. And arranged for your tuition, and other details about that?
A. Yes, sir.
Q. Had you ever studied before, automobile mechanics?
A. No, sir.
Q. And you have driven, I believe you said you had driven a Ford, before coming?
A. Yes, sir.
Q. You had not handled any other make of car?
A. No, sir.
Q. (Continue:) —before that time?
A. No, sir.
Q. How long a course is the course of study at the Rahe Automobile School?
A. Six weeks.
Q. And, at the end of the course, is there anything that they give, by the way of certificate, or diploma, to indicate the complete course?
A. Yes, sir.
Q. Did you receive one of those?
A. Yes, sir.
Q. And you received it at the end of six weeks after your arrival, did you?
A. Yes, sir.

Q. Now, what time was it, in St. Joseph, that you took this meal, dinner or supper, or whatever you want to call it?

A. It was about three o'clock—shortly after we got there.

Q. Then, you went out with the representatives of the Rahe Automobile School, out to the boarding house on Troost Avenue, I believe?

A. After we got to Kansas City.

Q. Yes. Arrived there, I believe, you said, about eight or eight-thirty?

A. About seven.

62 Q. About seven?

A. Yes, sir—at the Rahe Auto School.

Q. Well, I mean out to the boarding house?

A. About seven forty-five, at the boarding house.

Q. You had not announced, before—you hadn't known or communicated with the woman in charge of the boarding house, before arriving out there, had you?

A. No, sir.

Q. You hadn't known her before?

A. No, sir.

Q. Now, the next morning—what day of the week was it you arrived in Kansas City?

A. The third of January.

Q. What day of the week?

A. Saturday.

Q. Now, then, the next day, the day following—Sunday—you were in the boarding house?

A. Yes, sir.

Q. You got up and dressed, didn't you?

A. Yes, sir.

Q. When you arrived at the boarding house, the evening you arrived, did you inquire for a doctor?

A. The—I told them that I was in the wreck, and they wanted to get a doctor for me, and I told them I wouldn- get one until the next day.

Q. You were able, the next day, to get up and go down to your meals, weren't you?

A. Yes, sir.

Q. And started to school about when? The middle of the following week?

A. Somewhere around there, yes, sir.

Q. Now, with reference—or I will inquire first as to your ankle? You say that was—you had a cut just above your shoe top?

A. Yes, sir.

63 Q. And, which foot was that?

A. On the left.

Q. Did you have anything the matter with your right ankle?

A. No, sir.

Q. Can you tell me why it is alleged in your petition that you bruised and injured your right ankle, foot and limb?

Mr. Hogsett: That is my mistake, Mr. Thomson. I would like to amend that, if the court will permit me? I alleged the right ankle, and it should have been the left.

Mr. Thomson: I think this isn't the time to allege injuries in this suit.

Mr. Hogsett: Oh well, if you want to make a point of it, go ahead.

Mr. Thomson:

Q. You don't know of any reason, then, why you alleged there was an injury to your right ankle?

A. No, sir, not unless it was a mistake.

Q. What business had you been engaged in, before coming to Kansas City?

A. Farming.

Q. Had you had anything, before that time, to do with automobile repairs?

A. No, sir.

Q. Now when you left Kansas City—by the way, who was the doctor that called upon you in Kansas City?

A. Doctor Bleil.

Q. And, when was the last time he treated you—when was the last time he saw you?

A. The day before we left Kansas City.

Q. About February eleventh, or twelfth, or thirteenth?

A. Yes, sir.

Q. (Continuing:) —1920?

A. Yes, sir.

64 Q. Have you been to see him or has he been to see you since then?

A. I was up at his office yesterday.

Q. Well, I mean, except the preparation of the law suit, had you consulted him, at any time, before yesterday, or seen him any time before yesterday?

A. No, sir.

Q. What physician did you consult, after returning to Illinois?

A. No one.

Q. After you left Kansas City, you returned to Illinois—and what did you do then?

A. I didn't do anything for about four weeks.

Q. And then, what did you do?

A. I opened a small garage.

Q. Now, did you open it for repair work, and renting space, a service garage as storage, or what was the fact about that?

A. For repair work, and supplies.

Q. And, you are operating that yet?

A. Yes, sir.

Q. And, what assistance have you had in operating this garage, besides yourself—any?

A. None.

Q. Sir?

A. None.
Q. And, that has been true, ever since you opened it, as I understand?
A. Yes, sir.
Q. At the time, during this period, since you opened it—do you ordinarily open this garage in the morning?
A. Yes, sir.
Q. What time do you open it?
A. Seven o'clock.
65 Q. And when—do you begin working at seven o'clock?
A. I open at seven.
Q. Do you begin working?
A. No, sir.
Q. What do you open it for?
A. For gasoline, oil and supplies.
Q. Sir?
A. For gasoline, oil and supplies.
Q. To sell that?
A. Yes, sir.
Q. That is part of your work there, isn't it, selling those?
A. Yes, sir.
Q. What time do you close in the evening?
A. About eight thirty.
Q. What kind of facilities have you for handling gasoline there, and have you had, during that time you have been operating the garage?
A. I have got a gasoline pump.
Q. That pumps it direct into the car?
A. Yes, sir.
Q. Did I understand, Mr. Wechsler, that you were never troubled with this dizziness, or these attacks, as Mr. Hogsett called them, until three months after this accident?
A. Yes, sir.
Q. And, that was after you had returned to Kansas City, and that was after you had returned to your home in Illinois?
A. Yes, sir.
Q. And, as I understand, regarding those (attacks), you never consulted a physician?
A. No, sir.
Q. They didn't give you any great anxiety, did they?
A. They did, at the time.
Q. Well, why didn't you call upon a physician?
A. Because we don't have any in the town that I am at.
66 Q. You mean you have no physician available, in the event you get sick, where you are?
A. Not right in that town—about seven miles.
Q. Isn't there a physician you can call over, go to one of those little towns right there, and see, whenever you have need of a physician?
A. About seven miles, there is.

Q. Can't you go to see the doctor—you have a doctor that calls, that calls around in your district, whenever anybody calls them?
A. Some of them do.
Q. Do you own an automobile?
A. Yes, sir.
Q. It runs all right, does it?
A. Yes, sir.
Q. How long have you had it?
A. Going on five years.
Q. That is a Ford?
A. Yes, sir.
Q. It "will take you there and bring you back," as advertised, won't it?
A. Yes, sir.
Q. Did you examine these cars, the car you were in, after you were taken out (of the wreck)?
A. Yes, sir.
Q. You went back and walked around there, and examined the car?
A. Yes, sir.
Q. How long did you take in doing that?
A. I don't know.
Q. Well, what would be your estimate about it, Mr. Wechsler?
A. Oh, I went there different times, I couldn't say.
Q. About how frequently did you go over to where the car was, while you were there near Wyeth, and examine it?
67 A. I didn't go over, over two or three times.
Q. Sir?
A. Not over two or three times.
Q. Did you examine the other parts of the train?
A. No, sir.
Q. How long did it take, until the cut on your leg got entirely well?
A. About a week or ten days.
Q. And, how long before the bruises were gone?
A. The bruises never left.
Q. Sir?
A. The bruises I received above my hip, never left.
Q. Do you have that yet?
A. Yes, sir—not that you can see it on the outside.
Q. How can you see it, Mr. Wechsler?
A. You can't see it by looking at it.
Q. Well, when it gets so—how long after the accident was it there, got so you couldn't see it?
A. It was about three or four weeks afterwards?
Q. Now—And, at that time, all of the injuries which you had sustained, had vanished, so far as you could see from the outside, is that correct?
A. Yes, sir.
Q. And, what time did you—by the way, do you own or lease your garage?

A. I lease it.
Q. And, on what day did you enter into this lease, with respect to when you moved in?
A. The seventeenth of March is when I moved in.
Q. You signed the lease, and moved in after that?
A. I had negotiated arrangements for the building in the fall, before I left for school.
68 Q. Sir?
A. I had made arrangements for the building in the fall, before I left for school.
Q. Then, you signed your lease, you say, the day you moved in?
A. Yes, sir.
Q. And, began paying rent from the day you moved in?
A. Yes, sir.
Q. For a month after you left Kansas City, you went to Prairieville, then, during the first month after you left Kansas City?
A. Not until the latter part of the next month.
Q. You went—did you move to Prairieville when you opened the shop, about the seventeenth of March?
A. Yes, sir.
Q. And, before that, you were living on the farm, during that month?
A. Yes, sir.
Q. At my request, did Doctor Hall examine you?
A. Is that the Chicago doctor?
Q. Yes, sir.
A. Yes, sir.
Q. How many times?
A. Twice.
Q. When was the first time?
A. I don't remember when the date was.
Q. Well, a general idea about that—maybe I can help you (Mr. Thomson refers to papers). Well, a few months ago, wasn't it?
A. I think it was.
Q. Where were you then?
A. In Chicago, Illinois.
Q. At Doctor Hall's office?
A. I think it is his office.
Q. It was suggested that it was the seventh of November, of last year—do you think that would probably be correct?
69 A. I think it would be somewhere around there, in the fall, it was.
Q. From what you observed, what did Doctor Hall's examination consist of?
A. He examined me all over.
Q. Did he examine your reflexes—that is, at the knees, and the other reflexes?
A. Yes, sir.
Q. Did he take a specimen of your urine then?
A. I don't remember whether he did then, or not.
Q. How long a time was consumed in that examination?

A. About a half an hour, as near as I can tell now.
Q. You stripped and he examined you all over?
A. Yes, sir.
Q. Now, when was his other examination made?
A. Today.
Q. That is, during the noon hour?
A. Yes, sir.
Q. And, what kind of an examination, if you could observe—I don't mean technically—but what did he seem to do then—did he again examine you all over?
A. Yes, sir.
Q. You stripped, so he could?
A. Yes, sir.
Q. Did he take a specimen of your urine then?
A. Yes, sir.
Q. Tested your reflexes, did he?
A. Yes, sir.
Q. Your deposition was taken on January 14, 1921, I believe?
A. Yes, sir.
Q. And, do you recall, Mr. Wechsler, about how long a time was occupied in taking your deposition then?
A. About an hour and a half.
70 Q. And, your brother's deposition was taken at the same time, or just immediately following?
A. You say my brother's?
Q. Your brother's deposition was taken immediately following yours?
A. Yes, sir.
Q. Don't you recall, on that occasion, of the men there, that you were the only one that didn't let his kidneys act, during those depositions?

Mr. Hogsett: Just a minute, Mr. Thomson, you don't claim he was there when Sam Wechsler's deposition was taken—you excluded him.

Mr. Thomson: Whose was taken first?
A. Mine.
Q. Were you in the room when your brother's deposition was taken?
A. No, sir.
Q. And, at the time you were there, do you recall it being remarked there on that occasion, you were the only man that did not leave the room?
A. Yes, sir.
Q. Just after you were injured, what did you do for yourself—wrapped a handkerchief around your ankle?
A. Yes, sir.
Q. And, anything else?
A. No, sir; that was the only thing then.

Mr. Thomson: That is all.

Redirect examination by Mr. Hogsett:

Q. Mr. Wechsler, Mr. Thomson has asked you how many doctors were there on the scene of this wreck, immediately after, and you testified there were about eight or ten. How well filled was the train?

A. It was filled up pretty well.

71 Q. Was it practically a full load?

A. Yes, sir.

Q. Do you know how many hundred people there were on it?

A. No, sir.

Q. Were there others, of the people there, passengers on the train, that were hurt worse than you were?

A. Yes, sir.

Q. And, that these doctors were looking after?

A. Yes, sir.

Q. Some people were killed in the wreck, weren't they?

A. They weren't killed outright, they died shortly afterwards.

Q. You were in this chair car that jumped off that track, and rolled one and one-half times down that twenty-five foot embankment, and wound up in a corn field twenty-five or thirty feet away from the track, on which the train was running?

A. Yes, sir.

Mr. Hogsett: All right.

Mr. Thomson: I object to that as leading and suggestive, and ask it be stricken out.

The Court: Sustained.

Mr. Hogsett:

Q. Mr. Thomson asked you if the cut on your ankle had gotten well, and you told him it did. "Has the cut on your head gotten well," and you said it had?

A. Yes, sir.

Q. Has the injury on your back gotten well?

A. No, sir.

Q. Has the injury on your left limb gotten well?

A. No, sir.

Q. Has the injury that resulted in your attacks of vertigo gotten well?

A. No, sir.

2 Q. You have gone to Chicago, and been examined by their chief surgeon up there?

A. Yes, sir.

Q. You have gone there on one occasion, and submitted yourself to a complete examination by him?

A. Yes, sir.

Q. And again, today, at their request, he has again examined you?

A. Yes, sir.

Mr. Hogsett: That is all.

Recross-examination by Mr. Thomson:

Q. Mr. Wechsler, with these difficulties you have described, the injuries, why didn't you consult some doctor?

A. Because they were busy around there, and I told others abou it, and they said they would see about me, and tell a doctor.

Q. Why didn't you——

Mr. Hogsett (interrupting): Where was that?

A. At the wreck.

By Mr. Thomson:

Q. You told who?

A. Some of those that were able to get around better than I was.

Q. Anybody that was there—you mean, told some passengers, o somebody that was there, to see if anybody was injured?

A. I don't remember whether it was a passenger or whether i was some of the neighbors that lived close there to the scene of th accident.

Q. Now, Mr. Wechsler, with the injuries you have described, wh haven't you consulted a doctor, after your return in the middle o March, 1920, to your home?

A. Because Doctor Bleil, I went to get his advice about i
73 before I left here, and I was told that only time would tell and a doctor wouldn't do very much for it, couldn't do any thing.

Q. Didn't you say this dizziness had developed after you left here

A. Yes, sir.

Q. Well, why didn't you communicate with some doctor about that?

A. Because it didn't give me any severe pain.

Q. Because you didn't think it was of sufficient importance to cal upon a doctor?

A. Yes, sir, it was.

Q. Well, why didn't you do it?

A. Because I haven't the financial ability to call a doctor any time, in cases like that.

Q. Do you mean to tell this jury, Mr. Wechsler, that you weren' financially able to call a doctor there in the neighborhood, where you lived, for treatment, when you needed treatment?

A. Not of that nature.

Q. What nature?

A. Of anything like I described.

Q. (Continuing:) —that you haven't the financial means, to g away in your automobile, go and see a doctor, and have him examine you, in that neighborhood, and vicinity where you live—is that correct?

A. I am not able to go when I have those attacks.

Q. I don't mean while you have them—any time—why didn' you go between them?

A. Because I don't need any doctor's attention afterwards.

Q. You were fixed a great deal like the man that didn't have a roof on the house when it didn't rain, and couldn't put it on while it was raining, and didn't need it while it wasn't, weren't you?

A. (Witness does not answer.)

Q. Mr. Wechsler, may I see the scar, just above your shoe top?

A. Yes, sir.

Q. Let me see it.

(Whereupon witness shows place requested to counsel.)

Q. Where is that?

A. Right in there, somewhere (indicating).

Q. Right in there somewhere—can't you indicate the exact spot of it?

A. Not from here.

Q. I would like to show it to the jury, and let them see if they can see any scar there. I haven't been able to see it. Just turn around here (witness exhibits part of leg): (placing witness before the jury). See if they can locate it? Show a scar?

Q. Now, it was somewhere around the part that was exposed, now wasn't it?

A. What do you mean?

Q. Between the top of the sock, as it is now rolled down (witness having rolled sock down on shoe top), and the bottom of the underclothing (indicating)?

A. Yes, sir.

Mr. Thomson: That is all.

(Whereupon witness resumed witness chair.)

Q. Now, Mr. Wechsler, is there any scar remaining on your head, where you say you were hurt, or cut?

A. I am told there is.

Q. Will you indicate the neighborhood of it?

A. Right in there (witness indicates).

Q. May I examine it?

A. Yes, sir.

Q. Mr. Wechsler, step over this way, and let the jurors see—let them see if they can see a scar.

(Whereupon witness steps over to the jury box.)

By Mr. Thomson (continuing):

Q. Now, indicate, please, to the jury, about where it was? (To the jury:) Will one of you look?

(Whereupon a juror examines witness' head.)

Mr. Thomson: That is all, Mr. Wechsler.

Mr. Hogsett: That is all.

(Witness excused.)

Dr. A. W. BLEIL, of lawful age, being produced, sworn and examined, as a witness on behalf of the plaintiff, upon his oath testified as follows:

Direct examination by Mr. Hogsett:

Q. State your name to the court and jury, please?
A. A. W. Bleil.
Q. What is your profession, Doctor?
A. Physician.
Q. How long have you practiced your profession?
A. Twenty-five years.
Q. Doctor, were you called by the lady, at 2432 Troost Avenue, to see George Wechsler, following his injury on a wreck, on the Great Western, in January, last year?
A. Yes, sir.
Q. And, when did you first see him?
A. I think it was Sunday morning.
Q. That would be what day of the month?
A. The fourth.
Q. Of January?
A. Yes, sir.
76 Q. How long was he under your care?
A. Well, he was under my care until some time in February.
Q. About how many weeks, in all?
A. I should judge about six weeks.
Q. During that six weeks' period, how frequently did you see him, and treat him?
A. Well, I saw him daily, to the seventh, including the seventh of January.
Q. And, from then on, how frequently?
A. Every other day, or probably twice a week.
Q. And, did he make visits to your office the latter part of the six weeks' period?
A. Yes, he called at my office two or three times, or three or four times.
Q. Doctor, in your own way, I want you to tell the jury the condition this man had, or what the condition was, as to his injury, while he was under your observation?
A. When I first saw him, there was a break in the skin, and there were bruises of the skin above, and back of the left ear, and it had bled some, and I dressed that for him, and then I found there was a—there had been a contusion immediately back of the left kidney, above the left hip bone, and to the left of the spine, considerable contusion there, and soreness, and pain, is what he complained of, and a cut just below the Gluteal muscles, or the large hip muscles, on the left side, at the junction of the large hip muscles with the muscles of the leg. Then, there was an abraison of the skin, back, and extending below the ankle bone, on the left side of the left ankle, on the outside of the left ankle.

Q. Doctor, what was the nature of the care, of the treatment you gave him?

77 A. It was germicidal and for the purpose of healing, for the process of healing up these abraisons, as quick as possible, and protecting them from the infection, or germs that might have taken place while he lay at the place of the injury.

Q. And did you treat him with success in that?

A. Yes, all the bruises healed up, by what we call "first intention," without any pus, or any infection showing.

Q. Yes. So far as the cuts and bruises were concerned, you got good results?

A. Yes, sir.

Q. In normal time?

A. Yes, sir.

Q. Now, Doctor, did you examine this man's urine?

A. Yes, sir.

Q. On how many occasions?

A. Twice.

Q. What prompted you to do that?

A. Well, he complained of pain in the left side, the region of the left kidney, above the hip bone, and from the injury, from the accident, as described to me, it would appear from his complaint, there were some bruises, bruising or contusion of the kidneys, and for that reason I wanted to be able to take care of them intelligently, and must have an analysis of the urine to do so.

Q. And, do you recall when these examinations of the urine were made?

A. The examination of the—the first examination was about the fifth or sixth of the month.

Q. Of what month?

A. January.

Q. And when was the second examination?

A. About the twelfth of February.

Q. What was the result of this first examination of the 78 urine?

A. Well, the most notic-ible thing was the blood that was found in the urine.

Q. To what extent was the urine affected with the blood?

A. There were some red blood corpuscles, and some white blood corpuscles.

Q. What was the nature of the examination you made?

A. It was both chemical and microscopic.

Q. That is, you looked at the urine through a microscope, and then you examined it chemically?

A. Yes, sir.

Q. Do you know—Doctor, what would the natural inferences be, by a doctor, in the case of a man who received a blow over the kidneys, followed by complaints of pain in the region of the kidney, followed by an examination, revealing blood in the urine—what would be the inference that would follow that, as to the condition of the kidneys?

Mr. Thomson: Just a minute, that is objected to as not the proper form of expert testimony.

Mr. Hogsett:

Q. What was the matter with the left kidney?

Mr. Thomson: That is objected to for the same reason.

Mr. Hogsett:

Q. Do you know what the matter was with the left kidney, Doctor?
A. The blood indicated a congested condition, which was undoubtedly caused by the trauma that existed at that time.
Q. And, the "trauma" means what?

Mr. Thomson: Just a minute, if Your Honor please, I
79 don't mean to be captious, but I ask that be stricken out.
Mr. Hogsett: That part, as to what it was caused by, may be, and we will get at it in another way.

Q. Did you treat this man for that condition?
A. I did.
Q. And, what was the nature of that treatment?
A. The second analysis proved the treatment was correct, by reason of the fact there was no blood found in the second analysis, no pus.
Q. What was the nature of the treatment?
A. The treatment consisted of a remedy that we use in such cases, wherever we find blood, and it gets rid of the congestion.
Q. Doctor, there was some remark made by the plaintiff, about frequency in urination—is that a natural result of such a condition?
A. That would be, yes, sir.
Q. Now, what was your finding at the second analysis, of the urine?
A. The second analysis of the urine was normal, with the exception of the fact that a few shreds were found in the urine.
Q. And what is the significance of that?
A. Well, that would just merely show that the extra tissue that had be-n scaled off by the congestion, was coming away.
Q. That second urinal analysis was when—what date?
A. About the twelfth day of February.
Q. 1920?
A. Yes, sir.
Q. By the way, Doctor, you have examined the plaintiff lately, have you not?
A. Yes, sir.
80 Q. Recently?
A. Yes, sir.
Q. When was that?
A. Yesterday.
Q. Now, in your own way, tell the jury what your findings are, based on your present examination?

A. The findings at present indicate that he has a condition there of the head, produced by some injury, following a contusion or concussion of the brain.

Q. What do you mean by "concussion"?

Mr. Thomson: Just a moment, I think this is not within the issues of the case, and not a proper subject of testimony. The doctor can say what he found.

Mr. Hogsett:

Q. I will withdraw the answer, in so far as it does not relate to the question—is that what you object to?

Mr. Thomson: I am objecting to the form of the question.

Mr. Hogsett: Just withdraw the entire answer.

Q. In your own way, Doctor, tell what you find at this time, and after an examination of the man.

A. I find, on examining the hearing, the hearing of the left ear is impaired about twenty-five per cent.

Q. Go ahead.

A. (Continuing:) I find that on stooping, leaning forward, that there is some pain elicited on pressure, directly over the left kidney. No pain whatever on the right kidney, in the same position; that there is a scar at the junction, a scar in the skin at the junction of the Gluteal, or heavy hip muscles, with the leg muscles.

Q. Where is that, on the leg?

A. That is on the left side, right here is where it would be, just here (indicating)——

Q. (Interrupting.) It would be in that corresponding place on the left side?

A. Left side, instead of the right. That is where it is.

Q. All right?

A. (Continuing:) —then, there is some stiffness, and lack of suppleness in the left hip, that does not exist in the right hip. That is what I find at present.

Q. Are these things that you have just enumerated things that you yourself can demonstrate?

A. Yes.

Q. That is, they are there objectively?

A. Yes, sir.

Q. Without the patient's word cutting any figure in the matter?

Q. Well, the patient's word didn't have any effect.

Q. The patient's word didn't have any effect, so far as those findings are concerned?

A. No.

Q. Doctor, I want you to assume, for the purpose of this question, the following facts to be true: That a young man, twenty-three or twenty-four years old, weighing one hundred and sixty-eight pounds, riding as a passenger on a train, in a chair car, of a railroad train, at a speed that is very high; that the train strikes a curve, and leaves

the track; that the car, in which this young man is riding, rides on the ties for some distance, and then rolls down an embankment, estimated at from fifteen to twenty-five feet in height, and stops in a corn field about thirty-five feet, thirty to forty feet from the track, the car having made one complete revolution, and then half
82 a revolution, the violence of the collision being such that the entire running gear of that car is stripped away; that the windows, inside of the car, are smashed out, that the seats, some of the seats inside the car are torn loose from their attachments to the floor; that the car is well filled; that the passengers are thrown against the side, top, and bottom of the car, and against the seats, and against each other, as this car is turned over, as indicated; then assume that this young man is rendered unconscious for some length of time, which is not known—some minutes—five minutes, we will assume; that he is helped out of the car by others; that this accident occurs at about seven thirty o'clock in the morning; that shortly after noon, or about one o'clock, he is taken in a special train to St. Joseph, and then to Kansas City; that he received, at the time of the accident, a blow about two or three inches above, and an inch back of his left ear, and received a contusion on his hip and ankle, and a blow over the back. Assume that about three months after that time, he began to suffer with attacks of vertigo; that, for a period of minutes—five or ten minutes— these attacks last, that they are followed by a dull pain in the head, for two or three hours; that there is not absolute unconsciousness, but a partial unconsciousness, and that he has to hold to something, to keep his equilibrium; assume that these attacks come possibly once or twice in a week, and have increased since the time they began, in frequency: I will ask you to state whether or not those attacks could reasonably
83 have resulted from the injury described in the hypothetical question, in your opinion?

A. They could.

Q. What do those symptoms indicate as to the nature of that trouble, that causes the attacks of vertigo and partial unconsciousness?

A. Well, it looks as if it is a progressive condition, which is getting worse all the time.

Q. From what fact would that——

A. (Interrupting and continuing:) —from the fact they are more frequent now, than they were at first.

Q. What do you call that condition?

A. You call that petit mal.

Mr. Thomson:

Q. What do you call that?

A. Petit mal.

Mr. Hogsett:

Q. That is (spelling) P-e-t-i-t M-a-l?

A. Yes, sir.

Q. How near is the left kidney, from the place where this contusion was, on this man's back?

A. That depends on the thickness of the fat on the skin.

Q. Take a man such as he was——

A. (Interrupting and continuing:) —anywhere from an inch to an inch and a half.

Q. From what?

A. To an inch and a half.

Q. Doctor, was this blood in the urine visible to the eye,—that is, could you see it—could you see the reddish color in the urine, when you examined it the first time, when you examined the first specimen?

A. Slightly so, only a little redder than normal urine.

Q. Having in mind the fact that certain of these injuries which you have described as existing now, have persisted for a year
84 and two months since the injury received in January, 1920, state whether or not, in your opinion, those conditions which you find there, are reasonably certain to be permanent?

A. Yes, they are.

Q. What effect, Doctor, would the fact that this man's weight, at the time of the injury, was one hundred and sixty-eight pounds and his weight now, approximately one hundred and forty-eight and one-half, indicate—what bearing would that have to a medical mind?

A. That he hasn't returned to the normal.

Mr. Hogsett: You may examine.

Cross-examination by Mr. Thomson:

Q. Doctor, when you called upon Mr. Wechsler, you called to see him and his brother?

A. Yes, sir.

Q. Did you call upon Mr. George Wechsler, after you had completed your services with Mr. Sam Wechsler?

A. I don't remember which one I attended first, or which one I examined first.

Q. Do you remember which one you called upon the longest?

A. No, I couldn't tell you now which one it was.

Q. So you don't recall, then, whether all the visits you made to the address given, were to see Mr. George Wechsler?

A. Well, the visits I made at the house, I think each time I was there I saw both of them, as I recall it now.

Q. Now, Doctor—did I understand you to say that all of the symptoms you have described, which you found upon a re-
85 cent examination, yesterday, were objective symptoms only?

A. All except the pain that he complained of when I had him in the stooping position.

Q. Yes. Well, what would you say as to the deafness, Doctor?

A. As to the deafness?

Q. Yes, sir.

A. That can be demonstrated.

Q. Sir?

A. That can be demonstrated.

Q. How was it demonstrated?

A. By the ticking off a watch, using the same examination tha the United States Government requires for postal clerks, in the rail way mail service.

Q. Doctor, isn't it a fact that—as I understand, the objectiv symptoms are symptoms that the examiner can see, and the sub jective symptoms are those the patients tell the doctor about?

A. That is true.

Q. Well, in this test you made with a watch, you can't determin from that any objective symptom, whether he is hearing it or not can you?

A. Why, no, of course not.

Q. That, as a matter of fact, then, isn't an objective symptom at all?

A. You are right.

Q. You found, you say, in addition to the subjective symptoms of dizziness and stiffness, the scar above the left hip, I believe?

A. No, just below.

Q. Just below the left hip?

A. Yes, at the junction of the leg and hip muscles.

Q. Now, what else did you find besides, Doctor, would that cover the things you found there?

A. I think that covered the things, yes, that were visible, yesterday.

Q. Did you find any other scars upon Mr. Wechsler, ex-
86 cept that just below the left hip?

A. No, I don't recall that I did, yesterday.

Q. Now, Doctor, when you say that the condition you have described as "Petit Mal"—is that it?

A. Yes, sir.

Q. That, translated, means "a little sick"—does it?

A. Yes, that is the literal translation.

Q. Yes, sir. And, when you say that the condition that was described in the hypothetical question here, is "progressive," you rely only upon the statement that the difficulty has increased in frequency?

A. No, not entirely on that. I rely upon the fact that our experience has shown that in such cases, many such cases as that, that the literature tells about, and we find that in the medical journals, that where it begins some time after the injury, and continues in frequency, the interval between the attacks being shortened and shortened each time, and the attacks apparently—apparently being longer and more intense each time, that indicates permanency, and indicates a chronic condition that isn't going to be gotten rid of very soon—and there are not many of them that do.

Q. Now, do you mean, Doctor, that that applies to all symptoms that develop in general, or to this particlar symptom?

A. It applies to this particular symptom, and it applies also to injuries to large joints.

Q. That is what you say—is that a general application, of anything that increases, indicates that it is increasing?

A. Yes, sir.

87 Q. That is about what it amounts to, isn't it?

A. Yes, sir.

Q. Did you find any condition, while you were treating Mr. Wechsler here, that would indicate any such condition coming on?

Q. As what?

Q. As dizziness, spells of partial——

A. (Interrupting:) No, such a condition as that doesn't develop after a trauma——

Q. (Interrupting:) Sir?

A. Such a condition as that doesn't develop until some time after.

Q. What, definitely, Doctor, can produce that condition—what definite injury can do that—not just the fact that a man has been hurt, can do it, can it?

A. An injury that damages the brain tissue itself, the brain cells.

Q. And, it requires an injury that does damage to the brain cells?

A. Yes.

Q. (Continuing:) —before this result is produced?

A. It requires that sort of an injury to produce unconsciousness, and an injury that produces unconsciousness of any length of time, as a rule is followed by just such a condition as he has.

Q. But—by "any length of time," do you mean covering a period of hours?

A. Well, minutes, or hours.

Q. Well, don't you make—isn't there a difference, in your opinion, in the magnitude of the injury, whether a man is unconscious four or five minutes, or whether he is unconscious four or five hours?

A. Certainly, certainly.

88 Q. Well, now, don't you distinguish between those two durations of unconsciousness, about the result that you would expect to find, that could develop from it?

A. Have we any record of the number of minutes or hours he was unconscious?

Q. I am assuming, Doctor, for the purposes of this question, he was unconscious four or five minutes.

A. It takes considerable damage to brain cells to produce unconsciousness lasting only that length of time.

Q. What percentage, Doctor, would you think, of people, who, through any traumatic cause—that is, from the receipt of injury from the outside, that have remained unconscious four or five minutes, have produced dizziness, after three or four months?

A. I couldn't say, as I have not made a special study of nerve diseases, and brain injuries.

Q. Could you indicate whether there would be a large or a small percentage, in such cases?

A. I just told you I couldn't say, because it would be merely guess work with me. The man who attempts to answer that question, should be more posted on such work as that, with regard to brain injuries, and nervous diseases.

Q. Then, Doctor, I take it that the question of whether the extent of the injury, which would require, or which would produce a dizziness, is also in the same category—that is to say, that would come beyond your general practice as well, wouldn't it?

A. It does, yes, sir. That is true. But, I know this, in my reading, in a general way—not by special practice, but in cases that I have met with, in years past, that wherever any person has
89 had a blow to the head, that would produce unconsciousness, and that a few months later peculiar dizzy spells came on, that rendered him totally, or semi-conscious, semi-unconscious, and these conditions do become more frequent, the seizures become longer in extent, as to time, and the patient having a longer time of debility, after the worst of the seizure is over, before he has entirely recovered his normal condition—I do know these cases do go on, and get progressively worse.

Q. Doctor, have you known past cases of any of your patients suffering from dizziness and partial unconsciousness for a few minutes, that have not received any injury?

A. Yes, I have known such cases.

Q. Have you known—does that occur with a fair degree of frequency, or how is that?

A. It occurs with Bright's Disease cases, and sometimes with cases of diabetes.

Q. And, do you know of other cases, in which it occurs, other than those two diseases?

A. Oh, it may occur in others. I am not familiar with the other conditions, as much as I am with disease of the kidneys.

Q. Now, Doctor, do I understand, then, that when unconsciousness is produced from an external blow, that that affects brain cells?

A. It does.

Q. Doesn't it frequently occur that such periods of unconsciousness have no lasting results—that within a very short time all cases later adjust themselves?

A. It might, but I do not recall any such cases just now.

Q. Doctor, what would you say as to prize fighters, who are knocked unconscious. Do you think, that they, ever being
90 knocked unconscious, are rendered permanently disabled from the further pursuit of this vigorous exercise?

A. They are knocked unconscious, as a rule, by reason of the fact that the other man knows just their vulnerable point, you know, and strikes there, on some particular nerve, that renders him unconscious for a short time, but don't damage the brain cells.

Q. But, Doctor, I thought you said unconsciousness was the result of injury to the brain cells?

Mr. Hogsett: Oh, no, no.

The Witness: A. I said in this particular case.

Mr. Thomson:

Q. How about all cases? Is unconsciousness always produced by injury to the brain cells?

A. No, a man can be struck on the solar plexus, and knocked out, and be unconscious for a short time. That happens frequently to a prize fighter.

Q. Then, this short unconsciousness can be produced without anything affecting the brain cells at all?

A. That is true.

Mr. Thomson: That is all.

Mr. Hogsett: That is all.

Witness excused.

Thereupon, a recess was had for a short time, and after said recess, the following proceedings were duly had):

Mr. Hogsett: I offer in evidence the deposition of Mrs. Catherine Lowry, taken in this case on February 25, 1921.

(Whereupon the following proceedings were had outside of the hearing of the jury):

Mr. Thomson: Before you do this, I have marked a few objections here, that the court better pass on.

Mr. Hogsett: All right.

Mr. Thomson: I thought it would save breaking in (interrupting). On page six, the fourth and fifth questions and answers on page six, with regard to the complaints made by the plaintiff I object to those as merely self-serving declarations. The Court of Appeals might want to rule on those.

Mr. Thomson (reading):

"Q. Now, did he make any complaint of having been injured recently?"

The Court: Overruled.

Mr. Hogsett: That is competent, but I will withdraw it. Eliminate the fourth question and the fifth question and answers.

(Which said questions and answers, so eliminated by agreement of counsel, are in words and figures as follows, to-wit):

"Q. Now, did he make any complaint of having been injured recently?

A. Yes, he said he was in a wreck coming here. He was coming to school.

Q. And they had a wreck? Did he say that wreck happened some time that day?

A. Some time that day, and they got in here that night. They were in the wreck, that is where they got bruised up.

Mr. Thomson: I ask that both of the last two preceding questions and answers be stricken out as merely self-serving declarations."

Mr. Thomson: Later down on that page, the fourth question from the bottom—from then on to the second question on page seven, down through my objection.

92

Mr. Hogsett: We will eliminate all that. Withdrawn.

(Which said questions and answers, so eliminated by agreement of counsel, are in words and figures as follows, to-wit):

"Q. Did he tell where he got his injury he complained of?

Mr. Thomson: Same objection.

Q. I am asking her as to whether he did tell.
A. Yes. He said he was injured and was in this wreck.
Q. He did tell you where he got the injury, did he?
A. Yes.
Q. Now, so that I can see whether or not I can couple up the injuries with the alleged accident in the petition, I want to ask you if he said how he happened to get injured?

Mr. Thomson: That is objected to for the same reasons, calling for a self-serving declaration.

Q. Just answer the question?
A. Yes; he did that.
Q. You say he complained about having been injured; now, how did he say he happened to get injured?

Mr. Thomson: Same objection.

A. In the wreck on the train as he was coming here is how he got into it."

Mr. Thomson: Now, in the middle of page eight (reading):

93

"Q. Was he making complaints of injury?
A. Yes, he felt pretty bad."

I don't think that is competent at all.

Mr. Hogsett: The answer is a conclusion—that is, that part of it after "yes." We will withdraw it.

(Which said questions and answers, so eliminated by agreement of counsel, are in words and figures as follows, to wit:)

"Q. Was he making complaint of injuries?
A. Yes; he felt pretty bad."

Mr. Thomson: Now on page nine, the last question is all right, but the answer is regarding what he complained of.

Mr. Hogsett: That is competent. That, we want to leave.
"Q. What was his appearance now as to injury during the first week that he was here at your place?" That is decidedly competent.
Mr. Thomson: Yes.

Mr. Hogsett (continuing reading):

"A. Well, he complained of his back and hip; he complained of his head hurting him, and"——

Mr. Thomson (interrupting): Now, I object to that as incompetent, irrelevant, self-serving declarations, and not responsive to the question.

The Court: Whether or not it is responsive——

Mr. Hogsett (interrupting): If it is material, it doesn't hurt whether it is responsive or not.

Mr. Thomson: That is not about his appearance.

Mr. Hogsett: I know, but the rule is, even if it isn't responsive, if it is material evidence, then it is competent. That is absolutely a competent answer.

The Court: Unless it is withdrawn, I will overrule the objection to it.

Mr. Hogsett: I want to stand on that.

To which ruling and action of the court, the defendant, by its counsel, then and there at the time duly excepted, and still excepts.

(Which said questions and answers so objected to by counsel for the defendant, are in words and figures as follows, to wit:)

"Q. What was his appearance now as to injury during the first week that he was here at your place?

"A. Well, he complained of his back and hip; he complained of his head hurting him and getting dizzy and blind like, and weak."

Mr. Thomson: On page ten, beginning with the third to the last question, with regard to his complaint. I object to that, to the end of the page, and the first line on page eleven.

(Which said questions and answers, so objected to by counsel for defendant, are in words and figures as follows, to wit:)

"Q. I will ask you to state whether or not he made any complaint about his hearing or his ear while he was here?

A. Yes, sir.

Q. What complaint, if any, did he make about that?

A. Well, he could not hear so well.

Q. Do you remember which ear he complained of not hearing so well in?

A. Yes, I believe that was in the left ear."

Mr. Hogsett: That is to the same effect (reading):

"Q. I will ask you to state whether or not he made any complaint about his hearing or his ear while he was here?

A. Yes, sir.

Q. What complaint, if any, did he make about that?

A. Well, he could not hear so well.

Q. Do you remember which ear he complained of not hearing so well in?

A. Yes; I believe it was the left ear."

Mr. Hogsett: Now we think that is proper.

Mr. Thomson: I object to that.

The Court: Overruled.

Mr. Thomson (continuing:) —a self-serving declaration of plaintiff.

To which ruling and action of the court, the defendant, by its counsel, then and there at the time duly excepted, and still excepts.

Mr. Thomson: On page nineteen, beginning (reading):

"Q. You told me awhile ago that the first week that George Wechsler was here," and so forth, to the bottom of the page.

Mr. Hogsett: Who is asking that?

Mr. Thomson: Prewitt, in the redirect examination.

The Court: Who is the witness?

Mr. Hogsett: She was Mrs. Catherine Lowry—she had charge of the boarding house (reading):

96 "Q. You told me awhile ago that the first week that George Wechsler was here, that he complained of dizziness and pains in his head, I believe you said?

A. Yes, sir."

Mr. Hogsett: And then she was asked how many times during the six weeks he was here, and she answered "five or six times a day." That is along the same lines the court has ruled on.

Mr. Thomson: That is objected to as hearsay, a self-serving declaration of the plaintiff, not competent.

(Which said questions and answers so objected to by counsel for defendant, are in words and figures as follows, to wit:)

"Q. You told me a while ago that the first week that George Wechsler was here that he complained of dizziness and pains in his head, I believe you said?

A. Yes, sir.

Q. Now, how many times to your knowledge during the six weeks that he was here did he complain of any dizziness or soreness or sickness in his head that you know of?

A. How many times?

Q. Yes, how many different times did he complain of this dizziness?

A. Oh, he complained a great deal, Mr. Prewitt.

Q. So that the court and the jury can get some notion about it about how often did he make any complaint that you know of about the dizziness and pains in his head and sickness in the head?

A. Well, he complained a great deal about every time I would go up to his room through the day, which would be three or four times a day, he complained of his head a great deal.

Q. Well, would you say it was two or three times a week or oftener, or more than that during the period he was here that he complained of this dizziness and pains in his head and sickness in his head?

A. Well, he complained as often as I talked to him. It would be as many times as five or six times a day."

The Court: Overruled.

To which ruling and action of the court, the defendant then and there, by its counsel at the time duly excepted, and still excepts.

(Whereupon the following proceedings were had within the hearing of the jury):

Mr. Hogsett: This is the deposition of Mrs. CATHERINE LOWRY, taken on February 25, 1921, in this cause, at the residence of the witness, Number 2432 Troost Avenue, Kansas City, Missouri. Appearances: Mr. M. T. Prewitt for the plaintiff, and Mr. Roy Thomson for the defendant (reading):

"Direct examination by Mr. Prewitt:

Q. Please state your name.
A. Mrs. Catherine Lowry.
Q. Where do you live?
A. 2432 Troost Avenue.
Q. Kansas City, Missouri?
A. Kansas City, Missouri.
Q. How old are you, Mrs. Lowry?
A. I am 62 my next birthday.
Q. Do you own your own home at 2432 Troost Avenue, Kansas City, Missouri?
A. Yes, sir.
Q. How long have you lived here in Kansas City, Missouri?
A. I have lived here off and on—I was away from the city for a period of time, about nine years.
Q. How long have you lived in Kansas City altogether?
A. I came here in 1886.
Q. About 34 or 35 years ago you came to Kansas City?
A. Yes, sir.
Q. And outside of the nine years, you have been living here in Kansas City continuously?
A. Yes, sir; and those nine years I just lived down in Warrensburg, Missouri. We did most of our trading here.
Q. Are you a widow lady?
A. Yes, sir.
Q. And what means do you have of making your living?
A. Well, I am a widow woman and I keep boarders here, and

keeping those boys that go to the Rahe Auto School since I moved to this house.

Q. How long have you been keeping boarders and roomers, particularly the boys going to the Rahe Auto School?

A. I have been keeping them—now this year will be nine years.

Q. That is Rahe or Sweeney?

A. No; the Rahe Auto School. I kept the Sweeney boys five years, and this year will make four years for the Rahe School. When Mr. Sweeney moved into his new school, he also built a hotel for his own boys and we lost out.

Q. And then you went to keeping the Rahe boys.

A. Yes, sir; this property was vacant at that time, and Mr.
99 Rahe said if I would come out and take this house he would keep my house full of boys.

Q. So you have been living at this place about four years?

A. Yes, sir; and I finally bought the place, or it would have been sold out from us.

Q. Mrs. Lowry, are you physically able to attend the trial of this case at the courthouse or not?

A. No, I am not. I am tired and worn out now.

Q. I will ask you if you have been confined to your home and largely to your bed for the past three months?

A. For the past three months I have not been out of this place.

Q. I will ask you if you are under the doctor's care now?

A. I am under the doctor's care and taking medicine.

Q. I will ask you if we asked you or told you that we would like to have you present as a witness at the courthouse?

A. Yes.

Q. And you told us that you did not believe you could physically make it there?

A. Yes, sir.

Q. And that is the reason that your deposition is taken here at your residence?

A. Yes, sir.

Q. And you do not feel that you will be physically able to get out of your house for some weeks yet?

A. No, I know it will be some time before I am able to get out.

Q. Now, I will ask you if you are acquainted with the plaintiff in this case, George Wechsler?

A. Yes, sir.

Q. When did you first get acquainted with the plaintiff,
100 George Wechsler?

A. Well, they came here to stop at my place. It must have been about the 3rd of January, a year ago.

Q. January 3, 1920?

A. Yes, sir.

Q. And what time of the day or night did George Wechsler come to your place first?

A. Well, he came here after supper. He came in about bed time, or eight o'clock, or some such time.

Q. About eight o'clock in the evening?
A. Yes.
Q. That was about the 3rd of January, 1920?
A. Yes.
Q. When these boys came in did you have them sign their names on a register book?
A. Yes; we have a register and they sign their names and their home address.
Q. And I will get you to state if at my request a few moments ago you looked up your register book to see as to the exact date that George Wechsler came and registered at your place?
A. Yes.
Q. And I will get you to state if that record showed that he came here for bed on the night of the 3rd of January, 1920.
A. Yes, sir; he came here for bed on the 3rd of January, 1920.
Q. Now, was there anyone with George Wechsler when he came in? Any relative with him.
A. His brother. The two brothers came together.
Q. Now, George Wechsler is the older one of the two boys, is he, or was he?
A. Yes, he is the older and married.
101 Q. How old was George Wechsler?
A. Well, I should judge he was 22 or 23 years old.
Q. And how old was his brother, Sam Wechsler?
A. He was about 19 or 20, I should judge.
Q. Now, when George Wechsler came to your place on this first evening, I wish you would describe to the jury and the court his appearance as to injury or otherwise?
A. Well, the boys looked pretty well shook up.
Q. I want you to just tell me about George Wechsler at this time. Just describe George Wechsler's appearance as to injury, if he had any such appearance?
A. Well, George—he was injured pretty bad about the face and ears, back of—I believe it was his right ear.
Q. Was it his right or left ear?
A. His left ear.
Q. I notice you were indicating your left ear. You said "right ear," and I did not know which you meant.
A. Well, he was hurt on his face and the right part of his face was bruised and bleeding and the skin rubbed off and the back of his ear here was cut pretty bad and bleeding.
Q. You have indicated back of his left ear, that it was bleeding and cut. Now, can you tell us something about the nature of that cut? Did you see that cut?
A. Yes, sir; it was a fresh cut and bleeding, and in about that shape (indicating).
Q. What was the size or length of that cut?
102 A. Well, it looked like it was two inches or more, two or three inches.
Q. In length?

A. In length, and his left hip and back seemed to hurt him.
Q. Was he complaining of his left hip and back?
A. Yes; he was bruised and cut and bleeding."

(Whereupon the following questions and answers were withdrawn by agreement of counsel, as hereinbefore set out, in conference outside of the hearing of the jury):

"Q. Now did he make any complaint of having been injured recently?
A. Yes, he said he was in a wreck coming here. He was coming to school.
Q. And they had a wreck. Did he say that wreck happened some time that day?
A. Some time that day, and they got in here that night. They were in the wreck and that is where they got bruised up.

Mr. Thomson: I ask that both of the last two preceding questions and answers be stricken out as merely self-serving declarations."

(Whereupon the following question and answer was read to the jury):

"Q. I will ask you if when you saw him on that evening when he first came here and you saw him, if he did make complaint about having suffered an injury? A. Yes; he did."

(Whereupon the following questions and answers were withdrawn by agreement of counsel, as hereinbefore set out, in conference outside of the hearing of the jury):

103 "Q. Did he tell where he got his injury he complained of?

Mr. Thomson: Same objection.

Q. I am asking her as to whether he did tell?
A. Yes, he said he was injured, and was in this wreck.
Q. He did tell you where he got the injury, did he?
A. Yes.
Q. Now, so that I can see whether or not I can couple up the injuries with this alleged accident in the petition, I want to ask you if he said how he happened to get injured?

Mr. Thomson: That is objected to for the same reason calling for a self-serving declaration.

Q. Just answer the question?
A. Yes, he did that.
Q. You say he complained about having been injured; now, how did he say he happened to get injured?

Mr. Thomson: Same objection.

A. In the wreck on the train as he was coming here is how he got into it."

(Whereupon the following questions and answers were read to the jury:)

"Q. Now, state whether or not he received any home remedies or home treatments for his physical condition that evening that you know about?

A. Yes. I asked him or inquired whether I should call a doctor, whether he thought it was necessary that he needed a doctor, and he said he believed not that night, but that if he had some liniment or something like that he would rub it on,

104 and I got some liniment, because he was cut and bruised, you know, and bleeding, and I had some Sloan's liniment here that we used and he put it on.

Q. Did you give it to him that night?

A. That night, and rubbed him myself. He got undressed and got into bed.

Q. Did you have any salves or anything of that sort that you used that night?

A. Yes, sir; I had this Sloan's liniment and I had this Vick's salve and rubbed it on and fixed their faces where they were bruised.

Q. Just confine this to George Wechsler. Now, I will ask you later about the other boy. What you have told about giving him attention that night, was that attention given to George Wechsler?

A. To George Wechsler; yes.

Q. Now, did you see George Wechsler the next day, which was Sunday?

A. Yes, sir.

Q. And how was his condition then as to whether he was better apparently or not so good or how?

A. Well, he was pretty sore and stiff and when I brought him his breakfast the next morning I asked him about a doctor and he said he believed he would stay in bed and for me to call a doctor.

Mr. Thomson: I ask that that answer be stricken out as merely a statement of the plaintiff.

Q. I will ask you to tell the jury and the court how he looked the next morning when you saw him and where you saw him?

A. Well, he was in his bed and he looked pale and nervous and very weak looking to me."

105 (Whereupon the following question and answer were withdrawn by agreement of counsel, as hereinbefore set out, in conference outside of the hearing of the jury:)

"Q. Was he making complaints of injury?

A. Yes; he felt pretty bad."

(The following questions and answers were read to the jury:)

"Q. State whether or not he wanted a physician this next morning after he had gotten to your place the night before?

A. Yes; he said he would like to have a doctor.

Q. State whether or not a doctor was called to come and examine and treat George Wechsler on the next morning after he had gotten to your house the night before?

A. Yes, I called the doctor or my daughter, I don't remember just now, and he waited on him and told him that he should stay in bed.

Mr. Thomson: Just a minute——

Q. (Interrupting). Don't tell what the doctor said. Did the doctor come that day?

A. The doctor came.

Q. And was that Doctor Bleil?

A. Dr. Bleil, yes, sir.

Q. And did Doctor Bleil come any more after that day?

A. Yes, sir; he came twice a day for a number of days, I think a week or so and then he came once a day for quite awhile.

Q. About how long did he come once a day after having come twice a day for a week or so?

106 A. For about a week and then he went to the doctor's office after he got around, and the doctor advised him.

Q. Don't tell what the doctor advised him?

A. All right.

Q. Now, did you have occasion to see and observe George Wechsler every day during the time he stayed here at your residence?

A. I did.

Q. How long a time did George Wechsler stay at your residence?

A. About six weeks.

Q. Did you see Doctor Bleil come at the various times to treat George Wechsler?

A. Yes, sir.

Q. Now, state whether or not George Wechsler got up and got out of the house at various times while he was there?

A. Yes; he would get up and go out and go over to the school and be back in a short time again.

Q. How long would he be gone from the house when he would be gone to school some times?

A. Some times not longer than an hour or a couple of hours; something like that.

Q. Did he go to school and stay there all day during his time here like the Rahe school boys usually did or not?

A. No; he did not.

Q. Did he make complaint concerning his physician condition and injuries during the time he was here, that you heard?

A. Yes.

(Whereupon the following questions and answers having been heretofore objected to, out of the hearing of the jury, as hereinbefore set out, the same were duly read to the jury, the said

107 objection having been overruled by the court, to which action and ruling of the court, the defendant, by its counsel, then and there, at the time, duly excepted, and still excepts.)

"Q. What was his appearance now as to injury during the first week that he was here at your place?

A. Well, he complained of his back and hip; he complained of his head hurting him and getting dizzy and blind like, and weak.

(Whereupon the following questions and answers were read to the jury without objection:)

"Q. Did he show any sign of apparent nervousness or anything of that sort?

A. Yes.

Q. How did that indicate itself to you?

A. Well, he looked to me like he was under a great shock or spell, you know.

Q. What indicated that to you?

A. Well, noticeably just from his injuries.

Q. Was there anything about his facial expression indicating that he had a feeling of distress or not?

Q. Yes; he seemed to lose his health and get paler and thinner.

Q. You say he got thinner?

A. Yes.

Q. State whether or not he seemed to go down in weight while he was here the six weeks.

A. Yes; he did not eat regularly. He did not eat hearty and he lost weight.

Q. How much weight would you say that he seemed to lose, in your judgment?

A. Well, I would imagine he was a man that weighed about 170 pounds, appeared like when he first came, and it looked
108 to me like he had lost all of 20 or 25 pounds, something like that. He got very pale and thin, and very thin in the face.

Q. Was there a noticeable loss of weight apparent to you as you observed him during the time he was here?

A. Yes, sir."

(Whereupon the following questions and answers having been heretofore objected to, out of the hearing of the jury, as hereinbefore set out the same were duly read to the jury, the said objection having been overruled by the court, to which action and ruling of the court, the defendant by its counsel, then and there, at the time, duly excepted, and still excepts.)

"Q. I will ask you to state whether or not he made any complaint about his hearing or his ear while he was here?

A. Yes, sir.

Q. What complaint, if any, did he make about that?

A. Well, he could not hear so well.

Q. Do you remember which ear he complained of not hearing so well in?

A. Yes; I believe it was the left ear."

(Whereupon the following questions and answers were read to the jury without objection.)

"Q. I will ask you whether or not you gave him any special care and attention while he stayed here at your place?

A. Yes, sir; I tried to fix him things that he thought he could eat and encourage his appetite, you know. He seemed to be in a run-down condition.

Q. Did he seem to be able to eat the things that you tried to prepare for him after he thought he could eat them or not?

109 A. Well, he would try to eat them, but it did not seem like he would eat as hearty as he would if he was well. That is one of my plans with all of my boys if they are sick on my hands, I try to take care of them as best I can.

Q. Have you seen George Wechsler since he left your place about six weeks after he came here?

A. No; I have not seen any of them since they left for home.

Mr. Prewitt: That is all.

Cross-examination by Mr. Thomson:

Q. What assistance have you, Mrs. Lowry, in the handling of your house?

A. My daughter, has the management of it now, and I have two colored men and a man."

Mr. Prewitt: That should be "two women and a man."

Mr. Thomson (continuing reading):

"Q. How long has your daughter had charge of it?

A. Well, she has had charge now about six months, and I have been the last three months totally disabled to take any part.

Q. Mrs. Lowry, how large a house is this? How many rooms has it?

A. I have got eighteen rooms.

Q. And you keep it filled with these students of the Rahe Automobile School?

A. No; we don't keep it full all the time, but in the winters we are pretty well filled, but not in the summer time.

Q. And what was the condition in that respect during the

110 winter of 1919 and 1920? Did you keep it full at that time?

A. No; we did not. That was a year ago this winter—not after the first of the year we did not. We were very scarce of boys.

Q. Now, how many boys can you accommodate in the house?

A. Well, we can accommodate 25 very well.

Q. And they come for the six weeks' course of the Rahe Automobile School and then leave, do they?

A. Yes. Well, there is some few stay longer, but they don't generally stay longer than six weeks, as a general run.

Q. Those who have not been successful with the automobile school the first term, they stay and take another term?

A. You see they can come back at any time when they have paid their tuition. They can get their diploma in six weeks, and a great many stay longer on account of the shop experience.

Q. Do you know from your connection with the students of the school themselves, whether it is a theory course or study in automobile mechanic's.

A. Well, that is what I understand.

Q. That is just general reputation, is it?

A. Yes, sir.

Q. What would you say, Mrs. Lowry, as to the percentage of students who do not complete their regular work within the six weeks period?

Mr. Thomson: That is, that she keeps?

Q. Well, that she knows about or whether she hears otherwise. I suppose she knows about those boarders of hers better than
111 the other school?

A. Of course, we can all form our own opinions, and the way I understand is that if one-half of those boys make good, they would be doing well, because you know there are just a great many people, I don't care what you would put them at, they don't make good any way.

Q. And so you think that it would be a rather fair estimate to say that one-half of them get their diplomas at the end of six weeks, and the other half return for additional instructions?

A. No, not that. All of those will get their diplomas at the end of six weeks. I don't think any of them will miss getting their diplomas unless they are very badly behaved persons and they are dispelled from school, but any ordinary boy will get his diploma in six weeks; that is the study part of the school, and then there is the experience part which is in the shop work.

Q. But as I understand the diploma is issued for the complete studies, isn't it?

A. Yes.

Q. Now, you say Mr. George Wechsler came in about eight o'clock in the evening?

A. About eight as near as I can remember it, I know it was after supper.

Q. Did you see how he came, or did you just meet him at the door?

A. They came into the door and I met them inside there.

Q. Now, what treatment did you give him that night? You washed the blood from his face?

A. Yes, I fixed their faces and washed the blood off and put salve on, on his head and back where he was bruised and bleeding.
112 I had some clean, soft linens that I had and some salve that I had here in the house.

Q. You found the hip and back bleeding and back of the left ear bleeding and the left cheek bleeding?

A. Yes, sir; and the left cheek bruised as well.

Q. Did you after the doctor came the next day, did you apply liniment or salves to him then?

A. No, the doctor prescribed.

Q. So you did not have occasion for observing him in this respect except his face and ear?

A. His face. You know the doctor had bandaged him and fixed his head up again around where he was bruised and on his back.

Q. How long did the bandages remain on his head?

Q. Well, I should judge it was a week. Several days any way.

Q. At the end of that time, the appearance of the injury had healed, had it? About?

A. Well, no, the cut had not, but on the face had.

Q. You mean the cut back of the left ear?

A. Yes, the cut had not healed.

Q. How long did it take it to completely heal?

A. Well, in about two or three weeks afterwards.

Q. Was Mr. George Wechsler in bed for a few days?

A. Yes, sir.

Q. How long after he arrived was it that he first got up and walked around?

A. I think he stayed in bed about a week or something like that.

Q. Would you not think, Mrs. Lowry, that the fact that a man who had not been ill, but who was made to stay in bed
113 about a week, that that would tend to make him very restless?

Q. Well, I don't know.

Q. Well, isn't it your observation that even when a young man of previous good health is sick and has to remain in bed several days that it becomes very irksome to him and he becomes very restless?

A. I don't know anything about that. Probably it was, if he was well enough to get out.

Q. You mean by that, I take it, that if he was ill or seriously sick, they would not feel as restless about that as if they were not very sick?

A. Yes.

Q. So you did, as I understand, see Mr. George Wechsler after he came in after the evening he came in?

A. Yes.

Q. You did not see him up and dressed for about a week, you say?

A. No, sir.

Q. Do the students of the school take their meals here, as well as their rooms?

A. Yes, sir.

Q. And that was true of Mr. Wechsler; he took his meals?

A. Yes, sir; I carried his meals to his room during the time that he stayed in bed.

Q. Now, haven't you found it by your general observation of people to be the fact that when a person remains in bed without taking the usual amount of exercise that their appetite diminishes? That is true in the ordinary case, isn't it?

A. Well, I don't know.

Q. Isn't it your observation that without exercise that remain-

ing in bed, would tend to diminish the appetite or lessen
114 their appetite?

A. Well, it might have something to do.

Q. You think the tendency would be that way?

A. It might have.

Q. Not only might, but don't you think it would have a tendency to diminish the appetite and make it smaller?

A. I could not say. I could answer for myself in that case.

Q. Well, yourself, I assume you have not been taking the amount of exercise that a young man ordinarily takes in the country and on a farm?

A. No, sir.

Q. What did you do that night for the cut over the left ear? Put salve on it?

A. I put salve on it and arnica. My own home treatments here that I had in the house.

Q. You rubbed the other bruised places with Sloan's Liniment or something of that character?

A. Yes, sir.

Q. Then after Mr. George Wechsler was able to get up, after the first week, when he did get up, how frequently would he attend the school? How frequently as to days? Would he go there every day?

A. I don't know as he went every day, but he would get up and go over there and sometimes he would not be gone more than an hour until he would be back.

Q. How frequently would that occur?

A. I could not say. It might have been every day or every other day for quite a spell until he got up.

Q. You have not, I take it now, Mrs. Lowry, any definite idea of the amount of time that he lost from the school after he
115 commenced going there, have you?

A. I am pretty nearly certain that he lost the week.

Q. That is the week that he was in bed?

A. Yes, sir; and then after that I could not say just how much time. Some times he would be gone over there an hour and be back in hour or two hours, and that way.

Q. How long did that occur? How long was it before he attended regularly?

A. It went on that way for a week or so or some such a matter.

Q. And then after that he attended regularly?

A. Not exact regularly.

Q. To what extent was it irregular?

A. Well, I could not say. Maybe he would stay a half a day or something like that, and maybe a couple of hours in the forenoon, and a couple of hours in the afternoon, something like that, but I know he was in and out and did not attend regularly the school.

Q. How long was it before he did attend regularly, the full sessions?

A. I don't know. I think the last three weeks he got to going tolerably regularly.

Q. Now, then, during that last three weeks did he attend the sessions regularly, as far as you know?

A. As far as I know, he did; yes, sir.

Q. Now, when he came in the evening that he arrived, did he immediately undress and go to bed?

A. Yes, they went right straight to their room.

Q. And you say you met them at the door when they came in?

A. Yes, sir.

116 Q. What baggage did they carry, or did Mr. George Wechsler carry?

A. I think he just had a suit case.

Q. He was carrying that, was he?

A. Well, yes.

Q. And he carried that to his room when he went?

A. Yes.

Q. He and his brother came in alone, didn't they?

A. No; there was some other parties came with them from the school, and if I remember right, I think they carried their baggage to the room. They were brought over from the school. They bring them from the school here to the house.

Q. How many of them came in then?

A. Those two boys, Mr. George Wechsler and his brother, Sam.

Q. You mean when you say that some other man came in at the same time, were they new roomers or do you mean just some of your old boarders came in at the same time?

A. No; they were the boys that brought them over from the school—the men that brought them from the school. You see when they come here they go to the school and the school puts them around in the various boarding houses.

Q. You never knew or knew of George Wechsler before he came in here that night, I presume?

A. No, sir.

Q. Did you learn of his arrival? Did they telephone you from the automobile school or did you know in advance that he was coming?

A. No, sir. They come and ring the bell there. When they have boys for me, they ring the bell and I answer.

117 Q. The door bell, and the first you knew of their intended arrival was when they did arrive?

A. Yes, sir; when they came right there to the house.

Mr. Thompson: That is all.

Redirect examination by Mr. Prewitt:

Q. Mrs. Lowry, you are not an official of the Rahe Auto School or in any way connected with the Rahe Auto School, are you?

A. No.

Q. This is your own private residence and your private business here?

A. Yes, sir.

Q. And you keep these Rahe Auto students as a private business of your own?
A. Yes, sir.

Mr. Thomson: Objected to as leading and suggestive.

Q. State whether or not your keeping of the Rahe Auto School students is a private matter or a matter for the Rahe Automobile School?
A. It is my private matter. It is my livelihood.
Q. These statements you have made to Mr. Thomson about the percentage of boys that finish the course in a given time is only your guess or speculation?
A. Yes, sir.

Mr. Thompson: Objected to as leading and suggestive and I move to strike out the answer.

Q. State whether or not you have any access to the records of the Rahe Auto School, to give you any knowledge on which to base your own knowledge upon, as to the estimates as to how many students complete their course in six weeks' time or less?
A. No; that is just an opinion of my own.

Q. Mrs. Lowry, you had a son of your own a few years
118 older than George Wechsler, didn't you, at that time?
A. Yes, sir."

(Whereupon the following questions and answers having been heretofore objected to, out of the hearing of the jury, as hereinbefore set out, the same were duly read to the jury, the said objection having been overruled by the court, the defendant by its counsel, then and there, at the time, duly excepted and still excepts.)

"Q. You told me a while ago that the first week that George Wechsler was here that he complained of dizziness and pains in his head, I believe you said?
A. Yes, sir.
Q. Now, how many times to your knowledge during the six weeks that he was here did he complain of any dizziness or soreness or sickness in his head that you know of?
A. How many times?
Q. Yes; how many different times did he complain of this dizziness?
A. Oh, he complained a great deal, Mr. Prewitt.
Q. So that the court and the jury can get some notion about it, about how often did he make any -omplaint that you know of about the dizziness and pains in the head and sickness in the head?
A. Well, he complained a great deal, about every time I would go up to his room through the day, which would be three or four times a day, he complained of his head a great deal.
Q. Well, would you say it was two or three times a week or oftener or more than that during the period he was here that he complained of this dizziness and pains in his head and sickness in his head?

A. Well, he complained as often as I talked to him. It
119 would be as many times as five or six times a day."

(The following questions and answers were read to the jury without objection.)

"Q. Now, I believe you stated for the first week that at the various times you saw him during that first week, that you saw him in bed?
A. Yes, sir.
Q. I suppose it would have been possible for him to have gotten out of bed without you not seeing him during that first week?
A. Oh, yes.
Q. But what you are telling is that at the various times you did see him the first week, he was in bed?
A. Yes.

Mr. Thomson: Objected to as leading.

A. (Continuing:) And I carried him his meals there all the time, or my son would. He was here helping at the time.

Mr. Prewitt: That is all.

Recross-examination by Mr. Thomson:

Q. What floor did Mr. Wechsler room on?
A. Second floor.
Q. He and his brother roomed together there?
A. Yes, sir.
Q. Was there anybody else roomed there?
A. I don't remember now. It was a room for three or four boys, but I don't think there was only the two boys in that room.
Q. You do not recall?
A. There are two beds in the room and I had one boy on each bed.
Q. You do not recall I gather from the answer that dur-
120 ing the whole time they were here they were alone in the room, or whether somebody else was in their room part of the time?
A. No; I don't think there was. I think they had the room to themselves.
Q. Mrs. Lowry, in the course of a year, how many of the students from the Rahe Automobile school do you take in to board?
A. It is just according to when they are coming in. We have not been having a very good run of those boys, and of course, if we have a good run it would be different.
Q. Well, about the way they ran for six months, we will say of the last six months of 1919 and the first six months of 1920, how many of the boys did you say boarded here during that time?
A. Well, now, I will tell you; we did not have at that time—I don't think we had more than 15 boys in the house, 15 or 16 boys, because they were not coming in. The trade slacked off the first of the year, and I remember very distinctly on up until the forepart of last year

and all during the year we had a very short run of the boarders, very short.

Q. The Wechsler boys registered you say, when they came in?

A. Yes, sir.

Q. Have you that register conveniently so that I may see it?

A. Everyone of the boys register when they come in.

Q. (Mr. Thomson looking at register). What is the meaning, Mrs. Lowry, of the notation here (indicating)?

A. Well, that is the day and the meal they start in on.

Q. That is Saturday, "Bed, one—three?"

121 A. Yes; the first month and the third is the date, you see, and that is exactly when they commenced. They commenced with bed, if they commence with supper, we put "S" there. We understand it ourselves. It is our own bookkeeping.

Q. Yes; I knew that, and that is the reason I was asking you. Can you look at this register now and tell me how many new boarders came in on that date?

A. Well, I can tell right here (indicating). There is one, the "one-three," that is all the same date. It would be the first of the month, and usually the boys usually come in the heaviest the first of the month, because that is the way the lessons run, you know, from the first of the month to the last.

Q. After examining your register do I understand you to say that ten of the boys came in as new boarders on the same day that Wechsler arrived, January 3rd, 1920?

A. It must be so.

Q. That is what your register indicates?

A. Yes, sir.

Q. Now, these all came in under the same general circumstances as Wechsler did? That is, they were brought out?

A. They were brought here to my house.

Q. And you did not know them or know about them until they were sent out by the Rahe Automobile School?

A. No, sir; they all came to me the same way.

Q. Now, can you tell from your recollection how long these various other members—all these ten stayed with you?

A. Some stayed eight weeks, some ten, some six months and a year. That is the way these boys run, according to how they

122 can afford to spare the time and have the means to stay.

Q. Do you recall all these other eight men here, and how long they stayed with you?

A. I couldn not tell that, not making a note of that. I could not tell that.

Q. Now, Mrs. Lowry, do you remember Mr. S. T. Cantrell? He seems to have come to your house on the same day?

A. Yes, I remember the name.

Q. How much would you say he would weigh then he was there?

A. Well, I don't know. He was a man that would weigh about a hundred and fifty pounds.

Q. And what would you say as to the change of his weight while he was here with you?

A. Well, he gained. He bragged about his gaining.

Q. Now, what would you say about—there is another name which I cannot read. I will ask you about Mr. W. D. Milin?

A. Melin? Let's see, where was he from? That name is not very distinct there.

Q. You don't recall that?

A. No; unless there is something about those fellows at the time, we forget them.

Q. Well, the number of boarders that you had or the students of the school makes it impossible for you to remember definitely about them all, does it not?

A. Not unless there is something extraordinary comes up in their time here that we have to take note of.

Q. Now what does this entry on the next page where I see George Wechsler's name? What does that indicate Mrs. Lowry? I see he was registered on page 145?

A. Yes.

123 Q. Now, his name appears on page 146. What does that indicate?

A. Well, yes; that was those carrying their lunches. The boys carried their lunches and I made a note of the name. Very often we have to watch here at times, not here lately, but then at that time we did, was carrying out lunches to friends, and we set the names down of those carrying lunches and those that would be out late, for a late supper at night. They would not come back until late at night and I kept a little record so that we would know just whose names took out lunches.

Q. And Mr. George Wechsler was one in this crowd?

A. Yes, sir; he was one in this crowd.

Q. Now, I don't see the date on this list. Can you tell me when these names were entered?

A. No, I could not. I just simply set the names on that page of the boys carrying lunches. There was nothing to keep a run of the lunches that went out.

Q. Were they entered as the boys arrived?

A. Oh, no; they could not have been because they could not have stayed all day. It must have been at the wind-up period. I think that was when they went to the tractor farm. You see the tractor farm is across the river.

Q. But Mr. George Wechsler's name appears at the head of the list, the ninth?

A. Yes.

Q. And the next to the last one is dated January 26th, isn't it?

A. Well, that was dated—that was two names set on that there, but these here (indicating) without dates are the lunch men. Those were—a couple of names were put in instead of setting

124 them *them* out here (indicating). A couple of fellows registered in. You see they are dated there (indicating).

Q. And one of these men you refer to is one of the men that was entered on the other page, as I understand it?

A. Well, those are all here (indicating).

Q. Mr. Samuel Wechsler's name appears on page 145 as coming in on the third of January?

A. Yes.

Q. I notice Mr. Samuel Wechsler's name also appears on page 146 opposite?

A. Well, he is right there with his brother. They both took the same course, you know, and they both had their lunches out. Each man carried his own lunch.

Q. And that made some difference in the charges that you made against them?

A. No; it did not have a bit to do with that. That was our record of watching our business here, that there was not fellows carrying out lunches to pals, you know, and then come in and eat supper again, after carrying the supper out. You see we had to watch that too, sometimes, so having a practice like that, I set their names down aside.

Mr. Thomson: That is all.

Redirect examination by Mr. Prewitt:

Q. Mr. Thomson asked you if you could remember especially about various boarders and roomers you had and I believe you said you could not unless there was something unusual about their condition?

A. Yes; and the care we have to give them.

Q. Now, did you have to give Mr. George Wechsler and Mr. Sam Wechsler just the ordinary care or did you have to give them
125 unusual care and attention here for a good portion of the time they were here?

A. Yes, sir; unusual care on account of their condition.

Q. State whether or not your attention was directed especially to them in the matter of their physical condition and injuries?

A. Yes, sir.

Q. These boys, George Wechsler, was a total stranger to you?

A. Total strangers.

Q. You have no interest in this matter one way or the other, except to tell just what you know about it?

A. Just what I know about the case.

Recross-examination by Mr. Thomson:

Q. Now, did I understand from your register that ten boarders came the same day that Samuel Wechsler and George Wechsler arrived?

A. It must be. That is what the rigster shows there.

Q. Now, did they all come in together, do you know?

A. No, sir; sometimes they bring one or two, just as they come in to the school, they bring them over to the boarding house.

Q. Well, do you remember what the situation was this day when these men all came in or not together?

A. I know they did not come in together. They came in during that day.

Q. How many others came in with the two Wechsler boys?

A. None. They were brought over by themselves. You see these boys come in from all directions on different trains, at different times.

Q. Now, do you remember who came out with the two Wechsler boys?

126 A. No; I do not, because they use different boys over there and at different times. You see they just hire them. Sometimes they will last a week and sometimes a month and sometimes six months on those jobs, and I don't remember now who it was brought those boys over.

Q. Your register shows, I believe you said, that Mr. Samuel Wechsler's name appears on page 146 as one of the boarders who took his lunch with him? That is correct, isn't it?

A. Yes.

Q. He and his brother?

A. Yes, sir.

Q. Are both on that list?

A. Yes, sir. In regard to those lunches now is where the boys did not come home to their meals. We provide the lunch and they take it with them.

Q. Yes, madam; and that was true of both of the Wechsler boys?

A. Yes, sir; but I did not date that. That was just a little memorandum on the record for our own information.

Q. And that, I understand, was to prevent any of the boarders from taking out lunches who were not entitled to take them?

A. And passing them to people who were not entitled to our service and then they could come in and set down and eat their meals again; take the lunch out, you know, to a friend, you know.

Redirect examination by Mr. Prewitt:

Q. Mr. Thomson asked you about your register. You looked in your register and found there that the register shows Samuel Wechsler and his brother George registered at your residence on the night of January 3rd, 1920, didn't you?

A. Yes, sir.

127 Q. Now, this memorandum that you have on another page——

A. (Interrupting.) That is simply a list of names, without date or anything else.

Q. That is not dated and you cannot tell and have no independent recollection as to what date it was that Sam Wechsler or George Wechsler carried their lunches?

Mr. Thomson: Objected to as leading and suggestive.

Q. State whether or not you are able to tell from your register referred to by Mr. Thomson or from your own recollection and state

just when it was that Samuel Wechsler or his brother George Wechsler carried their lunch?

A. It was about the last week they were here, because that was about the last turn they took, is that tractor work.

Q. There is no date on the register to show?

A. No, I did not date that because that was only to keep a run of who was carrying out lunches, but I know it must have been the last week that they were here.

Recross-examination by Mr. Thomson:

—. Your thought about it being the last week, do you think that because of the character of the work they were doing at the Rahe Automobile School there?

A. You see they run classes over there and that comes in about the last class of the run of their studies, you know, the tractor work, and that is when we have to put up lunches for the boys, when they go to the tractor farm. They go in the morning and don't get back until evening.

Q. How do you account, Mrs. Lowry, for the date of January 26th, opposite Mr. Samuel Wechsler's name on the list of
128 boarders who carried their lunches?

A. That was not dated at all. You see that is not dated at all. There are two names there. At the bottom of that list were two fellows who instead of signing their names (indicating), they went and signed them at the bottom of this (indicating).

Q. This is Mr. Samuel Wechsler (indicating) whose name is the second from the bottom, but his name is over on the other page?

A. They were both here together.

Q. That register was made on page 145, wasn't it?

A. Well, the dating at the top of this other (indicating) has nothing to do with that.

Q. No? Now, let me get this straight. On page 145, George and Samuel Wechsler appear on the register as arriving January 3rd, on page 146 appear nine names, the first of which is Mr. George Wechsler and the next to the last of which is Samuel Wechsler. Now, I notice opposite the name of Samuel Wechsler, 'one—twenty-six', has that date any significance?

A. That has nothing to do with it, that is just a list of the boys who carried their lunch.

Q. You don't know how that date happened to be there?

A. You see that runs around here (indicating) and cuts that off. That has nothing to do with the boys except those who carried their lunch.

Q. What do you mean by——

A. (Interrupting.) You see that line there (indicating)?

Q. What does that mean?

A. That cuts that name off this list.

129 Q. The man following Mr. Samuel Wechsler put his name in the wrong place?

A. Yes, he came in later and I *left* him sign his name and he

signed it under that number of names and he signed it there (indicating) instead of on the register.

Q. Now, this name following Mr. Samuel Wechsler to the bottom of this list, who carried their lunches, arrived on the 26th day of January?

A. On the 26th day?

Q. Did he?

A. Yes; it must be, if that is the date there.

Q. And that was evidently entered as the last name entered on this page, 146?

A. Yes; that must have been entered right after those boys were carrying their lunches.

Q. That date and that name are entered after the names of George Wechsler and Samuel Wechsler appear?

A. Yes, sir.

(Witness excused.)
(Signature waived.)"

Mr. Hogsett: I would like to put on Dr. Neal now, I called him out of his office.

The Court: Very well.

Dr. J. PARK NEAL, of lawful age, being produced, sworn, and examined, on the part of the plaintiff, upon his oath testified as follows:

Direct examination by Mr. Hogsett:

Q. State your name to the court and jury, please?

A. J. Park Neal.

130 Q. What is your profession?

A. Surgeon.

Q. How long have you practiced, Doctor?

A. In Kansas City, since 1906.

Q. Were you surgeon in charge of the General Hospital for a number of years, Doctor?

A. Yes, sir, I was in charge of the General Hospital.

Q. And, have you been—are you now a surgeon of any railroad company?

A. Yes, sir.

Q. What road?

A. Consulting surgeon of the Missouri Pacific?

Q. How long have you been the consulting surgeon of the Missouri Pacific?

A. I don't remember—about four or five years.

Q. Did you make an examination of George Wechsler, this young man here (indicating plaintiff), recently?

A. I did.

Q. What was the nature of the examination that you made, Doctor?

A. I made an examination, a physical examination of his person, particularly directed at the head, and the left lumber region, the left hip, and the left ankle.

Q. What is the left "lumber region"?

A. That is the left part of the small of the back—pardon me for getting technical.

Q. In your own way, Doctor, and in plain terms, tell the jury what the condition of this man is now?

A. The condition we find him in now, taking up the conditions as we find them, and taking up the points examined: In the head, he has the healed scar, on the left side of his head, about—well, as the point to measure from, we will take the opening of the
131 ear—about three inches above that and an inch back of the opening of the ear. The eyes were next examined. There was a slight springiness, or irregularity of the pupil, when exposed to light, and also to accommodation.

Q. What does that mean?

Mr. Thomson: Just a minute, I think that is not in the case.

Mr. Hogsett: It is another symptom, or condition that appeared.

Mr. Thompson: We object to that.

Mr. Hogsett: We will eliminate the part about the eyes. Just go ahead, Doctor, and testify.

A. I don't want to get out of bounds, but then, the legal side of it and the medical side might not coincide so, if I do get off the track, there will be no objection to correcting me.

Mr. Thomson: I mean no discourtesy.

The Witness:

A. (Continuing:) All right, sir. The next I examined was his throat, and I found the throat reflexes normal, and that would apparently go—of course, that would come under natural. The next point I took up was the grasping power in the two hands, the right hand——

Mr. Thomson (interrupting): Just a moment, Doctor, that is objected to as not within the issues of this case.

Mr. Hogsett: All right, eliminate that part, Doctor.

A. Well, the next thing that—the next point we took up
132 was the left lumbar region, or the small of the back. There is some slight tenderness there. The next thing we took up was the left hip. He has a healed scar of a cut on his left hip, but there is some limitation of movement of the hip—that is, both actively and passively; and I will state that I mean by active motion what he can do himself, and by passive motion what he has aided by the examiner—what he is aided to do by the examiner. There is some limitation of motion of the hip, particularly backward, and in rotating it, turning the toe out and in. There is a healed cut of a—or scar of a healed cut on his ankle, which is healed, and apparently giving no trouble.

Q. Doctor, what is the extent of the disability in his left hip and leg?

A. Oh, I should say that, in percentage would be fifteen to twenty per cent of limitation.

Q. I want you to assume, for the purpose of this question, these facts to be true: That a young man, twenty-two or three years old, is riding on a railroad train, in a chair car, seated in the front part of the train, the chair car being, I believe, at the front of the train; that the train is running approximately—well, at high speed, the exact rate is not shown, and runs into a curve, and leave the track; that the car he is riding in, rides on the ties for some distance, and it rolls down an embankment fifteen to twenty-five feet high, and winds up about thirty or forty feet from the track, the car making one complete revolution, and then again turning over on its side.

133 The violence of the collision, or derailment is such that the running gears, the wheels, brakes, springs, and entire running gear of the car he is riding in, is separated, knocked off. That this car is well filled with passengers, including this man; that the passengers are thrown all over the car, against the sides, and the top, as the car goes over, and the seats and the floor, and against each other; that the effect on the man described in the question, is to cause an unconsciousness, a complete unconsciousness for an interval of time, estimated at possibly five minutes; that he regains consciousness, and is helped out of the car by other persons; that he is taken in a special train, about five hours later to Kansas City; that he receives the aid of a physician next morning, and thereafter every day for four or five days, and thereafter every other day for an interval of time, until six weeks after the injury was inflicted; that he had a blow upon the left side of his head, causing a wound there about two inches to three inches in length; that some time after this injury occurred, this man has attacks of dizziness, or vertigo, not accompanied by total unconsciousness, but simply by a half consciousness; that the attacks of vertigo last ten to fifteen minutes, and leave him with a throbbing headache for an interval of time estimated at several hours; that during the recurrence of these attacks he doesn't fall, but loses, at least to some extent, control over equilibrium, and necessitating that he hold to something to brace himself; that these attacks commenced about three months—they

134 commenced, in the form I have described here, about three months following the injury, and were recurrent at irregular intervals, possibly once a week, possibly oftener than that, twice or three times a week, and that they have increased in frequency since that time. Assume that this man never had that condition, any condition of that kind at all before; that he was a man in average normal health, and a vigorous young man; that he had been a farmer all his life, living in the open; assume that his weight, at the time of the injury, was approximately one hundred and sixty-eight pounds; that in the weeks following the injury, he lost down to one hundred and forty-two pounds, a loss of twenty-six pounds, and that today his weight is one hundred and forty-eight and one-half pounds, a loss, now, of approximately twenty pounds in weight.

I want you to state, Doctor, whether, in your opinion, as a physician and surgeon, the conditions respecting these attacks of vertigo and dizziness, and semi, or partial loss of consciousness, and partial loss of equilibrium, could reasonably have resulted from the injury described in the question?

A. They could.

Q. Doctor, what is the significance, or what do the symptoms that I have portrayed in that question, indicate as to the nature of that trouble?

A. Well, it is a description of a Petit Mal.

Q. What is a "Petit Mal?"

A. Well, it is a form of nervousness disturbance, in which the loss of consciousness, or partial loss of consciousness, equilibrium—the man is simply thrown out of balance for a variable period of time. It may be a second or two, or it may be longer.

135 Q. Petit Mal, is that a known and recognized nervous—or a disease and disorder of the *m*ervous and mental system?

A. It is a brain disorder.

Q. What causes it?

A. Well, it is caused by anything which thrrows the—which throws the nervous mechanism out of balance, or the brain out of function.

Q. Could a blow on the head cause it?

A. Yes, injury is given as one of the causes of it.

Q. What is the—what conclusion would you draw from the fact that these attacks began three months after the injury, and have increased at least measurably in frequency?

A. Well, that—the inference you would draw would be the connection between the injury, and the attacks they came on about the time we would expect these attacks, following a contusion, concussion of the brain.

Q. Oh, you get this kind of condition about that length of time after such an injury?

A. Yes, it doesn't begin immediately, there is a lapse of time.

Q. That is characteristic, then?

A. That is characteristic, yes.

Q. Assume, further, Doctor—oh, I want to ask you this, Doctor: What objective symptoms did you find on the examination of this man, of this condition of Petit Mal?

A. The only objective symptom that I recall finding was the sringiness of the pupil.

Q. Is that a characteristic symptom?

A. That characteristic symptom, yes, sir.

Q. Petit Mal—you have "Grand Mal," and "Petit Mal," do you?

A. Yes, sir.

136 Q. And, of what disease are those terms used in description?

A. Epilepsy.

Q. Petit Mal, is a form, a light form of epilepsy?

A. Yes, sir.

Mr. Thomson: That is objected to, as leading and suggestive.

Mr. Hogsett (interrupting): —state whether or not it is—I will put it this way: Is Grand Mal a severe form or light form of epilepsy?

A. Grand Mal is the severe form, where a patient loses entire consciousness, and has convulsions.

Q. And, of which form is Petit Mal?

A. That is the lighter form, where there may, or may not be loss of consciousness. In fact, a man might have Petit Mal, and lose consciousness for a moment, and resume his conversation where he left off.

Mr. Thomson: If the court please, I move that condition of possibilities, which the Doctor testified about, be stricken out, as not within the issues of the case.

Mr. Hogsett: You mean the last question?

Mr. Thomson: The question of Petit Mal.

Mr. Hogsett: You brought it into the case for the first time yourself, in the examination of Doctor Bleil. I am simply following up the line your questions laid out. I think I have the right, under the law. I have alleged the symptoms the Doctor described.

The Court: I think that is covered in the pleadings. Overruled.

To which action and ruling of the court, the defendant, by
137 its counsel, at the time, then and there duly excepted, and still excepts.

Mr. Hogsett:

Q. Doctor, assume this situation also, in connection with the man described in that question: That he received a blow over the left side of the small of his back, at a point where the left kidney is located; that Doctor—or the doctor who was called in by the landlady, at the place where he was staying, and who treated him for six weeks, was prompted by the nature of the injury, and of the complaint of the man to make an examination of urine under the microscope, and chemically; that the examination was made on the seventh of January, following, the sixth or seventh of January following the injury on the third, and that on examination, the urine, to the natural eye, presented a red cast, and that the examination itself developed the presence of blood in the urine. I will get you to state whether or not a blow, received in the manner described in the hypothetical question, could result, could have resulted in an injury to the kidneys sufficient to cause blood in the urine?

A. Yes, it could.

Q. Is an injury of that kind to the kidney, by a blow, external blow, sufficiently severe to cause blood in the urine, a serious matter, or not?

A. It may, or may not be. It may be just merely a slight bruise or it may be so much as to fracture the kidney.

Q. Assume, after the first examination of the urine, a second examination was made, on February twelfth—a little over a month

after the first; that that showed no blood, but showed shreds
138 of tissue, which the attending physician ascribed to tissue coming away from the kidneys; that that condition existed six weeks after the injury; that, following that, there was urinary disturbance, requiring the administration of medicine. I will get you to state whether or not that condition, the condition with regard to the kidney, and the effects resulting from it could reasonably have been resultant—could reasonably have resulted from the injury described in the hypothetical question?

Mr. Thomson: That is objected to, if the court please, because it is embodying conclusions, diagnoses from the testimony of another physician.

Mr. Hogsett: I will withdraw it, and put it in this form:

Q. Would a condition as lasting as that, Doctor, an injury to the kidney, indicate a serious condition, or a mere passing condition?

A. If the kidney was passing off shreds of kidney tissue, it would show the matter was healing, but there had been a serious injury.

Q. Is Petit Mal a serious matter, Doctor?

A. It is.

Q. What are the consequences?

Mr. Thomson: Just a moment, if the court please, we object to this as going into this matter, which is not within any of the allegations of the petition, not within the issues in the case.

(Whereupon the following proceedings were had outside of the hearing of the jury):

The Court: Well, Mr. Thomson, he states he is suffer-
139 ing from attacks of dizziness and semi-consciousness.

Mr. Hogsett: That is what he is testifying.

Mr. Thomson: Here is another question that comes into it. Mr. Hogsett brought it into the case. There is nothing at all here, except that one doctor testified to Petit Mal—nothing at all.

The Court: It is a question of whether or not that is the technical name that will support these allegations.

Mr. Thomson: We still object to this. He has an allegation in the petition, then he comes in and applies a technical name to it, namely "Petit Mal;" and then he tells us what it (Petit Mal) is in another case.

(Whereupon the following proceedings were had within the hearing of the jury):

Mr. Hogsett: Doctor, let me get this straight, by another question, on account of what has come up.

Q. Petit Mal is simply the name, is it not, which the medical men apply to attacks of dizziness and partial or total loss of consciousness?

A. Yes, sir, it is just as much of a——

Mr. Thomson (interrupting): May I ask, Doctor, is that all it means?

The Witness:

A. I beg your pardon.

Mr. Thomson: That is all it means?

The Witness:

A. Petit Mal is just as much of a disease among physicians as typhoid fever, or pneumonia, or anything of that sort, because it is a term which we use to designate a certain clinical condition.

Mr. Thomson: Now, if the court please, in view of that,
140 I renew the objection, as to relying upon a fixed disease, as the Doctor identified Petit Mal to be, as not within the issues of the case, and not within the allegations of the petition, and not traceable to the accident in question.

Mr. Hogsett: Counsel for the railroad brought the matter into the case for the first time this morning.

Mr. Thomson: Merely when the Doctor testified, I asked him what it was, and he defined it, and I maintained, and maintain now, it is not within the issues of the case.

Mr. Hogsett: If you object to the name, simply, we will withdraw the name, and exclude that from the question.

Mr. Thomson: I object to anything of that sort going into it.

Mr. Hogsett: That is a very general objection, and doesn't indicate what counsel wants excluded. If he merely wants excluded the name "Petit Mal," that is all right, but I have a right to prove as I have proved, the attacks of semi-consciousness, and vertigo. I think the designation of the name for that condition ought not to come out (of the record) because he brought it out, and brought something into the case, something he doesn't like, and that is no reason why he should have it excluded. I have a right to traverse the same ground he did.

Mr. Thomson: That is perfectly all right. He testified
141 as to a given name. I ask him what it was, and when he defined it, I think he is beyond the issues of the case.

The Court: The mere fact that a physician gave a technical name, other than described in the petition, wouldn't put it outside the issues. My understanding is that the Doctor testified to facts within the allegations of the petition, although the technical name is not set forth.

Mr. Hogsett: If there is any question about that, I would like to insert the name of that there, so that there will be no question about it—insert by interlineation the condition, and use "Petit Mal." I would like to do that now.

Mr. Thomson: If Your Honor please, this petition has been amended a couple of times, and the examination of the plaintiff has

been completed, and I object to amending it at this time, with regard to the plaintiff's injuries.

Mr. Hogsett: All right.

Mr. Thomson (continuing): I want to try the case within the issues made.

The Court: If you don't want to withdraw that, I will pass on the objection.

Mr. Hogsett: I will withdraw the designation of the name to this condition, so that there will be nothing that the defendant will have any grounds to complain about in the trial of this case.

The Court: Does that meet your objection—do you have any further objection (addressing Mr. Thomson)?

142 Mr. Thomson: That is my objection, if Your Honor please, and for that reason I ask the line of testimony pursued be stricken out, because it is not within the issues of the case and that name is not technically the name.

Mr. Hogsett: Just what do you want to exclude—what are you objecting to?

A. I don't know what you want?

Mr. Thomson: I don't care to satisfy you about that. I want to exclude everything not shown within the issues, in the petition.

The Court: Mr. Thomson, if you are objecting to the alleged name of Petit Mal only, Mr. Hogsett has now withdrawn all testimony referring to the affliction by that name. Unless you have any other objection, you can take an exception.

Mr. Thomson: No, I would like to have the court instruct the jury the designations and symptoms are not before the jury.

Mr. Hogsett: We agree that may be so considered.

The Court: Well, following that, I will instruct the jury they will disregard all reference to, and all designation of the term "Petit Mal," and all symptoms described as being symptoms of the disease "Petit Mal."

Mr. Hogsett:

Q. Now, Doctor, having in mind the fact that these conditions, the condition of the kidney, with the urinary disturbance, that follows that, that that has continued up to this time; that the condition of vertigo or dizziness, with partial loss of consciousness, has

143 continued up to this time, and that the limitation in the use or motion and strength in the hip and left limb has continued up to this time; that the injury occurred in January, 1920, I will ask you to state whether or not, in your opinion as a physician and surgeon, those conditions are reasonably certain to be permanent, or not?

A. I think they have reached their limit of recovery.

Mr. Hogsett: You may examine.

Cross-examination by Mr. Thomson:

Q. Now, Doctor, you found a scar, you say—you have identified that as a little back of the left ear?

A. Yes, sir.

Q. How extensive is that scar?

A. It is just a linear scar of what apparently was a cut, which healed without infection.

Q. And what would you say about the scar, at or near the left ankle?

A. That is a laceration, which doesn't—which apparently has fully recovered.

Q. Indicating a mark there now, fairly marked?

A. It is fairly well marked—it isn't a bad scar, at all.

Q. Did you find any other scars upon the plaintiff?

A. There is a scar upon his hip, which—on the outer side of the left thigh, which is part of the hip.

Q. Does that indicate a complete healing?

A. Yes, that is healed up.

Q. Now, were there any other scars?

A. I don't recall any other, no, sir.

Q. Doctor, among men generally, that are out, in the ordinary state of health, and attending to their business, that have received no injuries, how many of those people would you say, by percentage, have a perfect functioning of all of the organs and joints?

144

A. Well, now, that takes in considerable territory (laughing).

Q. Yes, sir.

A. (Continuing:) Because you have to take into consideration the man who has reached adult age—say twenty-one. If you would fix that, if you had to fix that as "adult age," up to the limit of longevity, that would be a question I don't think any man can answer.

Q. What would you say—are there a large percentage of people with one ailment or another, that have not received injuries, and have attended to their business, and lived to a ripe old age?

A. If there wasn't, I wouldn't have any business.

Q. Well, Doctor, aren't there a great many people, though, that have imperfect functioning of some organ?

A. Necessarily, yes, sir.

Q. Or that the—all of the joints and movements are not perfect, that do not—that (the people are not sick, and go as normal people, and attend to their affairs all the time?

Q. Well, now, that takes into consideration the fixing of what is known as a "normal" standard. You would have to have that standard to go by, and measure the deviation, one way or the other.

Q. As I understand your normal standard is theoretically the perfect functioning of the organs or place in question?

A. Yes, sir.

45 Q. And a large number of people that consider themselves well, that have not received injuries, have some imperfection n the organism?

A. Why, necessarily.

Q. Now, Doctor, if you examined a man, or a physician reported o you as examining a man on the seventh of January, with blood n his urine, and a little over a month after that, examined him gain, and he had no blood, but had some strings of tissue, would hat not indicate to you that the difficulty had been healed, and that he tissue had been re-supplied, and the whole tissues were there, and he old tissues were being cast away, in a normal way?

A. Now, as I answered that question on direct examination, I said indicated a healing process. I don't know whether the tissues had een replaced or not. It would at least indicate the hemorrhage had eased, and the healing process was going on, and the normal process oing on, however little or much that might be.

Mr. Thomson: That is all.

Mr. Hogsett: That is all, Doctor, thank you.

(Witness excused.)

The Court: Gentlemen, we will take our adjournment now, until ine thirty o'clock in the morning.

(Whereupon the court adjourned the further hearing of this ause, until the first day of March, 1921, and thereafter, on the said irst day of March, 1921, at the hour of nine thirty o'clock A. M., of aid day, came the same parties, and the jury having resumed their eats in the jury box, the following proceedings were duly had, to-wit:)

146 (Whereupon the following proceedings were had outside of the *rearing* of the jury:)

Mr. Thomson (handing paper to the court): This is a motion for ppointment of a physician. This is the situation, as I understand he facts: That examination has been made by Doctor Hall, on be-alf of the defendant, and at the defendant's request. Dr. Hall is in ourt. That, in view of the testimony that has been introduced by nd on behalf of the plaintiff, the facts of the case require examina-ion of another character, relating particularly to plaintiff's ear. his would not be included, exclusively by the examination which, t the defendant's request, has been permitted, as above stated.

Mr. Hogsett: In answer to that, I call attention of the court to the act that prior to the examination in November, by Doctor Hall, the etition alleged an injury to the hearing. The defendant asked me f we would permit our client to be examined by their physician, to hich we consented, and we sent him to Chicago, at the defendant's equest, to be examined by a physician chosen by them. They saw t to have Doctor Hall, their own physician, examine him, and he id examine him there completely. That yesterday they again asked or another examination, and we again permitted Doctor Hall to xamine the plaintiff yesterday.

Q. Now, they have had two examinations, and it seems to me that that is as far as plaintiff ought to be required to go.

Mr. Thomson: Now, Mr. Hogsett, on yesterday, I requested
147 an associate to be permitted to examine the plaintiff also with Doctor Hall, at the same time, did I not?

Mr. Hogsett: Yes, sir, and I took the position then, as I take now, that the defendant is simply permitted to have an examination. Now, whether by order of court, or by consent, if he gets the examination it amounts to the same thing, and to permit the defendant to have repeated examinations by different doctors, goes beyond the reasonable scope of the practice in such cases.

The Court: Let me ask you a question: At the time this examination was made in Chicago, was this amended interlineation in regard to deafness made?

Mr. Hogsett: Yes, sir, and previous to that.

Mr. Thomson: Where is that?

Mr. Hogsett (reading): "And, has suffered with deafness"—that portion of the amendment was in. The petition, as originally drawn, alleged his left ear and left side of his head were bruised, lacerated and inflamed.

Mr. Thomson: Mr. Hogsett, as I understand, the amendment in regard to dizziness and semi-consciousness in the petition was made last week?

Mr. Hogsett: That is correct, but the amendment, the allegation in regard to the deafness was made shortly after the petition was filed, as the records will show, and the allegation with regard to the left ear was in there, as originally filed. So, the net result was that when you asked for an examination by Doctor Hall, and got it, there was an allegation with regard to the injury to the left ear, and the suffering with deafness.

The Court: Well, if counsel for the plaintiff objects to this
148 additional examination, I think the court will sustain the objection, for the reason that you have had every reasonable opportunity heretofore to examine particularly as to the hearing, and the ear, because you were fully notified of the claim in that respect, by the petition.

Mr. Thomson: The defendant's position in that regard is, that if there is any deafness and semi-consciousness suffered by the plaintiff, that defendant is entitled to the examination by a physician, expert in the examination of ears and functions, and the result of functionings, and non-functioning in the various particulars.

The Court: As to the ear, you say?

Mr. Thomson: Yes, sir; whether or not the ear has any effect upon the allegation of alleged dizziness and unconsciousness, as well as deafness, and other allegations regarding the ear.

Mr. Hogsett: I think the defendant has been given more than the usual liberty in a case like this, and they have been given absolutely carte blanche scope, and they are not entitled to these repeated and additional examinations. It gives them an unfair advantage they are not entitled to.

Mr. Thomson: I don't see the advantage is unfair. You can have anybody examine him that they want.

The Court: I don't feel like compelling a man to submit to a third examination, where the allegations of the petition are such as to advise fully that he claimed damage to the hearing, and
149 the functions of the ear, previous to the examination.

To which ruling and action of the court the defendant at the time, by its counsel, duly excepted, and still excepts.

(Whereupon the following proceedings were had within the hearing of the jury:)

Roy B. Thomson, of lawful age (being the attorney for the defendant), being produced, sworn, and examined, on the part of the plaintiff, upon his oath testified as follows:

Direct examination by Mr. Hogsett:

Q. State your name to the court and jury?
A. Roy B. Thomson.
Q. You are attorney for the defendant?
A. Yes, sir.
Q. And, how long has your firm represented the defendant?
A. Well, I have as a member of this firm, and previously, represented the defendant with relation to the Chicago, Great Western Railroad, during all the time of the Federal Control.
Q. Yes, sir, and then you represented the defendant, former defendant, Walker D. Hines, Director General of Railroads, at and before, and after the date of the wreck, January 3, 1920?
A. I represented Walker D. Hines, as Director General of Railroads, during his occupancy of that office, so far as it related to the Chicago, Great Western Railroad.

Q. Yes, sir, and since his resignation, and the appointment
150 of the present defendant, John Barton Payne, you have represented him?
A. Yes, sir.
Q. In respect to various matters?
A. Yes, sir.
Q. Now, you did represent the Director General on January 3, 1920, did you not?
A. Yes, sir.
Q. On that date, was Walker D. Hines Director General of Railroads, operating the Chicago, Great Western Railroad?
A. I don't recall the date; I would say yes.

Mr. Hogsett: That is all.

Witness excused.

Mr. Hogsett: I offer in evidence the deposition of Christ F. Miller.

(Whereupon the following proceedings were had outside of the hearing of the jury:)

Mr. Thomson: Just a minute, there are two or three matters to be passed on before you offer it. On page four, part of the first answer——

The Court (interrupting): Who is the witness?

Mr. Hogsett: Christ F. Miller. We are doing this to save time.

Mr. Thomson: This part of the answer (indicating). The question was with regard to change in appearance of the plaintiff:

"Q. Will you tell us what you have noticed, I am referring to George Wechsler only?"

"A. Well, he is thinner in flesh and he has got more of a—I can't just word it right, more of a depressed look, oh not as ambitious looking, more thin in flesh, and he ain't, oh, I have always
151 thought he wasn't the same man any more to word it short. Not the same appearing man."

I am objecting to that part of the answer which includes in it the expression "oh, not as ambitious looking"—"oh I have always thought he wasn't the same man any more, to word it short." And just above that, "Oh, not as ambitious looking."

Mr. Hogsett: For what reason?

Mr. Thomson: For the reason that it is not competent. It is not the reply to a question, and it is a mere voluntary statement, and further, that it is not an expression of physical condition that the witness could have observed, and is nothing but his conclusion in respect to the matter.

The Court: You are basing your remarks now not to all of that answer but just part of it?

Mr. Thomson: No, sir, the two parts of it, which relate to whether or not he looks "ambitious," and the second is between the marks (commas) "Oh I have always thought he wasn't the same man any more."

The Court: I don't think that part of the answer reading "Oh, I have always thought he wasn't the same man any more, to word it short," may be sustained.

Mr. Hogsett: We withdraw it (to the stenographer): just make that memorandum there, Mr. Wolf (stenographer) that part goes out so that will not be read to the jury.

Mr. Thomson: On page 5 (reading): "A. Well, I could tell, being around them so long, being neighbors, they were always
152 spoken of as being strong.

Mr. Hogsett: Well, I will withdraw that first answer. Leave in the question, and the second part of the answer.

Mr. Thomson: On page forty-three; this is the question: "Q. Does George appear to be as good physically, as good in a physical way as he did when he went to Kansas City?"

Mr. Hogsett: That is not answered.

Mr. Thomson:

Q. How?

Mr. Hogsett: That is not answered there, see?

Mr. Thomson: Further on this is asked:

"Q. In your opinion I am asking for what you have observed, was he as good a man physically?"

Mr. Hogsett: Withdrawn.

(Whereupon the following proceedings were had within the hearing of the jury:)

Mr. Hogsett: I will read in evidence the deposition of Frank Millhouse, taken at Sterling, Illinois, on the Eleventh day of February, 1921. Mr. Chester L. Smith, of our firm, appearing for the plaintiff, and Mr. Roy B. Thompson, appearing for the defendant.
Mr. Hogsett: (Reading):

FRANK MILLHOUSE, witness for plaintiff, being first duly sworn was examined by Mr. Smith, and testified:

Q. What is your name?
A. Frank Millhouse.
Q. Where do you live, Mr. Millhouse?
A. Sterling, well it is at Penrose.
153 Q. Is that a town?
A. There used to be a post office there. There is a store there now.
Q. Where do you get your mail?
A. Sterling, Route 2.
Q. Sterling, Illinois?
A. Yes, sir.
Q. How long have you lived there?
A. All my life.
Q. You own a farm out here?
A. Yes, sir.
Q. How many acres?
A. Eighty.
Q. How long have you owned a farm?
A. Fifteen years.
Q. You are a married man?
A. Yes, sir.
Q. Have a family?
A. Yes, sir.
Q. How old are you?
A. Forty-eight.
Q. How long have you known the Wechsler boys, all their life?
A. You might say all their life.
Q. You lived neighbors to them?
A. About four miles apart.
Q. I think you know George better than Sam?
A. Yes.
Q. Now, do you remember the occasion when they went to Kansas City to attend an automobile school there a year ago this January?
A. Yes, sir,

Q. They were gone a few weeks?
A. Yes, sir.
Q. Do you remember when they came back?
A. Yes, sir.
Q. What in your opinion, from your observation of George Wechsler was his physical condition prior to the time he went to Kansas City?
A. Why, he was in good physical condition.
154 Q. Was he strong and robust, or not?
A. Always seemed to be.
Q. About what would you say his weight was before he went to Kansas City, his average weight?
A. About one hundred and sixty or sixty-five pounds.
Q. After his return from Kansas City, I am referring to George, did you notice any difference in his physical appearance after he got back?
A. Yes, I think I did.
Q. What was the difference that you noticed?
A. Why, he was lighter in weight, and he didn't look as well as he did when he left.
Q. Did you ever know of George being sick before he went to Kansas City, having any physical ailment of any kind?
A. No, sir, I did not.
Q. How much in your opinion had he lost in weight when he returned from Kansas City?
A. I should judge about fifteen or eighteen pounds.
Q. Has he regained any of that weight, or is he as light as when he came from Kansas City? Just your own opinion about that whether he gained any weight?
A. I don't think he gained very much.
Q. He seems to be about the same?
A. Yes, sir.
Q. Have you had occasion to be around him while he was doing his work since his return?
A. Yes, sir, quite often.
Q. How frequently have you seen him?
A. Oh, perhaps sometimes two or three times a week.
Q. You would see him there at the garage at Prairieville?
A. Yes, sir.
155 Q. George operates a small garage there, does he?
A. Yes, sir.
Q. In doing his work have you noticed that he has had any physical difficulty in doing it?
A. Yes, sir, he has.
Q. And in what way?
A. He couldn't lift as heavy as he used to before he was hurt.
Q. Referring to his hip, have you ever noticed any difficulty that he had with his hip?
A. Well, he told me several times.

Mr. Thomson: Wait just a moment.

Q. Don't tell what you heard him say, just what you noticed with your own eyes?
A. I have seen him lay his hands on his hip already.
Q. How many times have you seen him do that?
A. Oh, several times.
Q. Have you ever seen him stop work to rest?
A. Once in a while.
Q. Do you know why he stopped at that time?
A. I thought it was on account of his hip that he stopped."

(Whereupon the following questions and answers were excluded by agreement of counsel, the plaintiff's counsel having withdrawn the same, outside of the hearing of the jury: the same not being read to the jury:)

"Q. Does George appear to be as good physically, as good in a physical way as he did when he went to Kansas City?

Mr. Thomson: That is objected to as not a proper subject of inquiry from this witness, calling for a conclusion.

156 Q. In your opinion I am asking for what you have observed, was he as good a man physically?

Mr. Thomson: Same objection.

A. I don't think he was."

(Whereupon the following questions and answers were read to the jury:)

Cross-examination by Mr. Thomson:

Q. What is the nature of George Wechsler's business down there, is it general automobile repairing and general garage work?
A. Yes, sir.
Q. How many people has he with him in his business?
A. He is by himself.
Q. He hasn't any assistant or helper there?
A. No, sir.
Q. And how long has he been engaged in that business?
A. A year about the first of April.
Q. Of last April?
A. Yes, sir.
Q. Does he give every indication of knowing his business there and is he competent?
A. What is it?
Q. Does he give every indication of knowing his work well?
A. Yes, sir.
Q. Does he appear competent to handle the proper repair of automobiles?
A. Yes, sir.
Q. Of various makes, whatever ordinarily comes into the garage can he handle them?

A. Yes, sir.
Q. And do it well, can't he?
A. Yes, sir, I presume he can.
Q. What business was he engaged in before he went into the automobile business?
157 A. The summer before he went into the automobile business he worked for me.
Q. On the farm?
A. No, I quit farming, and I did paper hanging and painting.
Mr. Smith: You still own the farm?
A. Yes, sir.
Q. During that period did he work in the year, what time?
A. Oh, from the spring of 1919, until the fall of the same year.
Q. And how close do you live to his shop now?
A. About six miles.
Q. Mr. Millhouse, how far do you live from Sterling?
A. About eight miles, about seven miles and a half.
Q. How did you happen to appear here today?
A. I was notified to come.
Q. By telephone?
A. Yes, sir.
Q. Who telephoned you?
A. George's wife."

Mr. Hogsett: The Plaintiff offers in evidence the deposition of Christ F. Miller, taken at the same time and place.
Mr. Thomson: What page is that, Mr. Hogsett?
Mr. Hogsett: That is page one.
Mr. Hogsett (reading):

CHRIST F. MILLER, witness for plaintiff, being first duly sworn, was examined by Mr. Smith, and testified:

Q. What is your name?
A. Christ F. Miller.
Q. Where do you live?
A. Sterling Township.
158 Q. How far form Sterling?
A. Four and a half miles north of Sterling.
Q. Are you a farmer?
A. Yes, sir.
Q. Owner of a farm?
A. Yes, sir.
Q. How many acres have you?
A. Eighty-three.
Q. How long have you known George and Sam Wechsler, state approximately the date and time?
A. Well, I cannot give just exactly the full length.
Q. Just approximately.
A. I would say twenty years.
Q. How long in all did George Wechsler ever work for you?
A. Well, he worked for me at least two different times.

Q. And over what period of time would that work extend?
A. In one instance he helped me to gather about eight acres of potatoes, and I think he helped me to make some fencing, I know he helped me to make some fencing at another time.
Q. Outside of the time he has worked for you have you frequently seen him and talked with him and spoken to him?
A. Yes, we were close neighbors.
Q. The time that he worked for you was before he went to Kansas City?
A. Yes, sir.
Q. He was attending an automobile school there, is that correct?
A. Yes, sir.
Q. He has not worked for you since his return from Kansas City?
A. No.

Q. What was his apparent bodily and physical condition
159 prior to the time he went to Kansas City? In January, 1920? From what you observed?

A. Well, George was a strong robust man.
Q. Did you ever notice a condition that is a physical condition about George Wechsler before he went to Kansas City in January, 1920, which indicated that he had any physical weakness of any kind?
A. Not any.
Q. George is the older of the two boys?
A. Yes.
Q. Did you see George Wechsler after his return from Kansas City about February, 1920?
A. Right shortly after.
Q. And have you seen him since that time frequently or not?
A. Yes.
Q. You have seen him frequently?
A. Quite frequently.
Q. Have you noticed any change in the appearance of George Wechsler since his return from Kansas City?
A. I have.
Q. Will you tell us what you have noticed, I am referring to George Wechsler only?
A. Well, he is thinner in flesh and he has got more of—I can't just word it right, more of a depressed look."

(Whereupon the following part of the answer immediately above was excluded by the court, on objection of counsel for defendant, the same not being read to the jury:)

"oh, not as ambitious looking."
(And thereupon the next part of said answer immediately following was read to the jury as follows):

"more thin in flesh,"
160 (Whereupon the part of said answer immediately following the above was excluded by the court, upon objection of attorney for defendant, which said part of said answer is as follows, to-wit:)

"and he ain-t—oh, I have always thought he wasn't the same man any more to word it short."

(Whereupon the following portion of said answer immediately following the above excluded portion was read to the jury):

"Not the same appearing man."

"Q. In your opinion what would you estimate his loss of weight at in other words how many pounds has he lost in your opinion from your observation of Mr. George Wechsler?

A. Well, he has quite, he has lost quite a bit of weight, but of course, it is a little hard to get at that, but I should judge possibly around twenty or twenty-five pounds, around that I should judge it.

Q. That is merely your estimate about that?

A. Yes.

Q. You of course haven't seen him weighed?

A. No.

Q. And you are estimating?

A. As near as I can judge."

Mr. Hogsett: On page five, Mr. Thomson objected to that answer "Well, I could tell, being around them so long, being neighbors," of them, I withdrew that, but I notice the witness makes a second answer to that question, which Mr. Thomson doesn't object to, so I want to read, with the Court's permission, the question and the second answer, which isn't objected to.

161 The Court: Is that agreeable?

Mr. Thomson: I think that is not included in the objection.

Mr. Hogsett: Will you re-write your notes, Mr. Stenographer, so that it will include the question on page five, and withdrawing the first answer?

Mr. Hognett (reading):

"Q. Now you have related all you know about the physical condition of these two gentlemen?

A. Well, I always noticed that they were good, strong, able bodied working men and ambitious and I have never known either of them to be sick a day, that is as far as I could say."

Cross-examination by Mr. Thomson:

Q. Now Mr. Miller, about when was it that George Wechsler assisted you in gathering these potatoes? Just as an estimate so that we can get an idea?

A. Well, as near as I can tell now, about eight years ago.

Q. And he assisted you in making fence about the same time?

A. Shortly after that.

Q. How far do you live now from Mr. George Wechsler?

Mr. Smith: You mean the home where the old folks live?

Mr. Thomson: Wherever he lived, whatever the facts are about it?

A. Possibly about eight or ten miles I guess.

Mr. Smith: He lives at Prairieville now?

A. About ten miles.

Q. Do you know about how long he has been living where
162 he lives now?

A. Well, of course, I don't know whether he moved there when he first started his garage or not, but it is -round close I guess, around a year as near as I know.

Q. Then, prior to that time before he moved, where did he live with reference to your house, how far is it from it?

A. About two miles.

Q. And how frequently have you had occasion to see Mr. George Wechsler since he moved?

A. Well, sometimes maybe in a week, sometimes maybe in two weeks, just as we happen to run together.

Q. Now, when you speak Mr. Miller, of his difference in weight, is it the difference in weight before he went to Kansas City in January, 1920, and his present weight, do you mean that he weighed approximately twenty or twenty-five pounds more than he weighs now?

A. Well, it is as I give it in there, I should judge about twenty-five pounds less now than he did when he went down there, that is, when he started from here when I last seen him going from here.

Q. Do you know how long it was between the time you last saw him and the time he went to Kansas City?

A. Well, as near as I could honestly tell it, it might have been a week or ten days, something like that, oh, like neighbors would be, I should judge a week or ten days.

Q. What is his present business now?

A. Well, I think he is repairing automobiles now.

Mr. Smith: You are referring to George Wschsler?

Mr. Thomson: Yes.

163 The Witness: Yes.

Q. What would you estimate Mr. Miller the present weight of Mr. George Wechsler now?

A. Well, possibly one hundred and fifty or fifty-five pounds, something like that between one hundred and fifty and sixty.

Q. That is as near as you can estimate it, between one hundred and fifty and one hundred and sixty?

A. Why, in a guess between one hundred and fifty and sixty.

Q. Mr. Miller, to get a better understanding of your meaning in your description, what would you say now as to whether Mr. George Wechsler looks well and robust?

Mr. Smith: Object to that unless you can compare it as with the time before this accident, because it calls for a conclusion on the part of this witness and the giving of testimony which only one, such as a doctor or an expert in such matters could give properly.

Mr. Thomson: That is virtually the same as asked on direct examination as to his condition before; I am asking now, as you see him now, whether he has the appearance of a well robust man?

Mr. Smith: Same objection.

A. Can I, if I dare compare him with the way he looked before?

Q. No, it isn't for the comparison I am asking, I am asking in order

to get an understanding of the meaning of your previous testimony what you think about him now, whether he looks like a well robust man?

A. I know how you mean it, and you know how I would
164 like to compare it, but to me he doesn't begin to look good to me.

Q. What is there about his appearance at present that makes you say that?

A. His cheeks have slanted in, his eyes are further back, and he is thinner looking in the face especially.

Q. How long after he returned from Kansas City first was it that you saw him?

A. Well, it was possibly inside of a week, or maybe ten days as near as I can tell, inside of a week or ten days.

Q. And what would you say as to his present weight from appearances now and then?

Mr. Smith: You mean upon his return from Kansas City?

Mr. Thomson: Yes.

A. Well, of course, our conversation I cannot bring up.

Q. Now, I just want from appearances Mr. Miller?

A. Well, yes, I want to be square on that, of course, I noticed—

Q. Now, Mr. Miller, all I want is with respect to weight, how his weight compared from appearances with his weight when he came from Kansas City?

A. Well, now, I will tell you to be honest about it, I cannot just say exactly how he was at that time, because I will tell you on account of being glad to see him I didn't pay any attention to his condition excepting his stiffness.

Q. When did you first notice the difference in weight?

A. Well, short-y after he was here. Shortly after he was here.

165 Q. About what length of time after his return if we can get an idea about that?

A. Oh, it might have been possibly two or three weeks, something like that, perhaps that I commenced to take notice of him. Of course, I am just guessing at that, I am telling this as far as I can remember back, a per-on not knowing anything of this kind coming up of course, you don't make a study of it, you know how I mean.

Q. Mr. George Wechsler you say is here in the automobile business at present?

A. Yes, sir, at Prairieville.

Q. Is that the sale or repair of automobiles or both?

A. Well, I never was in his garage, I don't know.

Q. Do you know from talking to him of his business, you happen to know the general character of his business, or whether it was just some form of the automobile business?

A. No, I suppose it was——

Q. I want to know what you know about it.

A. I don't exactly know.

Q. Do you know who he is employed by now?

Mr. Smith: You mean George.
Mr. Thomson: Yes.

A. I didn't know but what he was running this little garage on his own hook, I am not sure though, as I never was in his garage, so I am not very well posted.

Redirect examination by Mr. Smith:

Q. Mr. Miller, the two boys were only gone from here about six weeks, is that correct?
A. Yes, sir.
Q. Now, is George's weight any heavier or lighter now than
166 when he came from Kansas City? In your opinion?
A. I should judge it was.
Q. In what way heavier or lighter?
A. He looks I am going by his face, that is right now at the present time, he is lighter, but his face looks so much more peeked, much more than he did when he came back."
Mr. Hogsett: Plaintiff rests.

Defense.

THOMAS L. RITCHEY, of lawful age, being produced, sworn, and examined, on the part of the defendant, upon his oath testified as follows:

Direct examination by Mr. Thomson:

Q. State your name, please, Mr. Ritchey?
A. Thomas L. Ritchey.
Q. And, what is your business?
A. General Agent, Chicago Great Western Railroad Company.
Q. And, located where?
A. St. Joseph, Missouri.
Q. Were you, during the Federal Control of Railroads, in the employ of the Director General?
A. Yes, sir.
Q. In the same general capacity?
A. Yes, sir.
Q. Do you recall a derailment of a train, about January 3, 1920, near Wyeth (Missouri)?
A. Yes, sir.
Q. How far was that place, derailment, from Wyeth?
A. From St. Joseph?
Q. From Wyeth, Missouri?
A. Oh, I don't recall. I think it is about two miles and a half
167 from Wyeth—two or three miles.
Q. And, approximately how far is that from St. Joseph, Missouri?
A. It would be about twenty-eight miles, I think.
Q. At what time of the day did you first hear of the derailment?

A. Well, I can't recall. I can't really recall just what time. It was in the morning.

Q. Do you know about when it was, with respect to when the derailment occurred—how soon after?

A. Well, I think it was within an hour—within an hour of the time of the wreck.

Q. What did you do then?

A. Well, I called the Burlington wrecker, I called our general surgeon, at St. Joseph, or our local surgeon, Doctor Schmidt and assistant surgeon, Doctor Conrad, and we made up a wrecking train, and started to the wreck.

Q. And, about what time did you arrive there?

A. Well, from the time I was notified, which was within an hour of the wreck, I think it was nearly two hours, before we reached the scene, or about two hours.

Q. When you got there, were there any nurses or doctors there?

A. Yes, the nurses and doctors were there from Savannah.

Q. About how many doctors did you see there—about how many doctors would you say were there?

A. Well, I know of three doctors that were there—that were pointed out as doctors—two of them I knew personally were doctors.

Q. And, how many doctors were with you?

A. Doctor Schmidt, and Doctor Conrad—two.

Q. How many doctors, would you say, as a whole, were
168 there, that you saw?

A. Well, there were five there, that I knew of.

Q. Well, did you know whether there were other doctors there in the neighborhood, with whom you were not acquainted?

A. Well, not to my knowledge, no sir.

Q. You don't know——

A. (Interrupting.) I don't know they were doctors. There were men there giving aid.

Q. And, how long did you remain?

A. I stayed there until the second relief train came,—I came in with the second relief train. We brought everyone in.

Q. And that left about what time?

A. Well, we reached St. Joseph after—between twelve and one o'clock I think.

Q. Did you and the people make general inquiries—was there a sufficient force there to treat any person that desired immediate treatment?

A. We took, in addition to the two surgeons from St. Joseph, I think we took six nurses with us, and there were five nurses there from Savannah. I should say that we did, yes, sir.

Q. Was there a sufficient force there, when you were there, to treat any person that desired or requested immediate treatment?

A. Yes, sir, they were given that.

Q. Sir?

A. They were given immediate treatment.

Q. And do you recall Mr. George Wechsler, in connection with that situation at the rear end of the counsel table (indicating)?

169 A. No, sir, I never saw him before in my life, that I know of.

Q. Did you leave there, you say, with the second relief train?

A. Second relief train, yes, sir.

Q. And, where did that go?

A. Well, we came into third Street Station St. Joseph, and we took from that train any that might have been, that were injured, or were supposed to have been injured and sent them to the hospital from there; then, I took the train from the Third Street Station, to the Union Station about two miles farther, and fed those people, gave them their dinners.

Q. How long was it after the arrival in St. Joseph, before the next train left for Kansas City?

A. Well, we used the Burlington out of St. Joseph for Kansas City, but put on an extra coach. That was between four and five o'clock, their regular Burlington train left.

Q. Do you know how inquiry was made, as to whether any person desired or needed attention—how was that?

A. Well that was done, by—I had a young man from the Yard office with me, and three young ladies from the local office with me, that assisted in making those inquiries, and I made the major portion—I should say, myself. They looked mostly after the feeding of the women and children.

Q. What was done with respect to those people who requested or apparently needed any attention?

A. We sent them to the Noyes Hospital, by a taxicab.

170 Q. During the period of Federal Control, and up until January 3, 1920, what would you say as to the volume of traffic handled over that road, compared with the period before the war, and before Federal Control?

A. Well, the traffic was—you mean as to its being heavy, or light?

Q. Yes, sir?

A. The traffic was heavier, of course at that time.

Q. Well, give us some idea as to the extent?

A. Well, of course we were handling the trains of troops. Our passenger business was decidedly heavier and we were handling Government supplies, heavy trains of Government supplies, and in addition to that, we were handling a heavier freight business of all kinds.

Q. What was done, covering this trackage, including that near Wyeth, and in that general neighborhood, with respect to work on it?

A. Well, the regular section forces, of course, were on duty at that time—those that we could secure.

Q. And what do you mean by that—did you secure the men you needed, or could—what were the circumstances about that?

A. No, we couldn't keep a full force in any department, on account of the shortage of labor. That applied to freight houses, as well as to trackage, and the other departments.

Q. Due to what condition?

A. Well, due to the scarcity of men, on account of war conditions, brought by war conditions.

Mr. Thomson: That is all,

Cross-examination by Mr. Hogsett:

Q. Scarcity of men, wouldn't cause a railroad engineer,
171 with a heavy loaded train, to run around a curve at sixty-five miles an hour, would it? Wouldn't have anything to do with the war at all, would it?

A. Nothing whatever.

Q. If the track was not properly kept up, an engineer should run more slowly than if it were in perfect condition, should he not?

A. Yes, if the track wasn't properly kept up.

Q. Well, was it properly kept up, or not?

A. Well, I couldn't tell you that.

Q. You don't know whether the track was in bad condition, or good condition?

A. No, sir.

Q. Never did find out?

A. No, I didn't make any investigations of that. That was out of my department.

Q. How big a train was that, that was wrecked?

A. I don't remember. I think four sleepers—two or three day coaches—two baggage coaches, possibly.

Q. That is, four, plus two, plus two, would be 8 coaches?

A. I think eight coaches, but I am not sure.

Q. Was it heavily loaded or not?

A. Yes, sir, it was.

Q. Practically a full load?

A. It was a full train.

Q. It was a full train?

A. Yes, sir.

Q. How many would that be, in numbers—how many people could be hauled in a full train?

A. Well, it is owing to the length of the coaches. Some coaches will seat sixty or seventy, also eighty; and there are sixteen section sleepers, and twelve section sleepers. I think those were all sixteen section sleepers.

Q. All big sized?

A. Yes, sir.

172 Q. Can you roughly estimate how many people were on the train?

A. Well, if there were one person to the berth, that would be thirty to each sleeper.

Q. That would be about one hundred and forty?

A. One hundred and twenty-eight.

Q. One hundred and twenty-eight, yes, that would be one hundred and twenty-eight.

A. I should say those were full length day coaches, if I remember correctly. I should think there would be seventy people to the coach.

Q. That would be one hundred and forty more—that would be two hundred and sixty-eight?

A. Yes, sir.

Q. About two hundred and sixty-eight passengers you were hauling, approximately?
A. Yes, if that was the train, but I don't remember.
Q. I am asking your best judgment?
A. Yes, sir.
Q. Mr. Ritchey, that was a very violent wreck, wasn't it?
A. Yes, sir; it looked so.
Q. I show you some pictures, and ask you if you identify those as accurate representations of the condition of the train, after you got there, two hours after the wreck (handing Exhibits "1" to "6" to the witness)?
A. Yes, sir; that was one coach over the bank (indicating). Yes, these all—those are the correct position of those cars.
Q. Now, can you identify what car this was that was on its side (indicating)?
A. The sleeper, over the bank?
173 Q. No, there are two or three sleepers over the bank, but I mean this one, the one in the cornfield—do you remember what car that was?
A. That was a sleeper.
Q. Aren't you mistaken about that? Don't you see—there was only part of this train got over the river.
A. Let me see the other pictures?

(Whereupon counsel hands other pictures to the witness.)

Q. You see, the bulk of the train didn't get over the river at all.
A. Those are the sleepers there (indicating).
Q. Yes, the sleepers didn't get over the river?
A. No, this is a day-coach (indicating).
Q. That is right. The pictures shown of the coach, or car in the cornfield, is the coach?
A. That was a coach.
Q. That is a day-coach or chair car?
A. That is a day-coach or chair car, yes, sir.
Q. Now then, the facts were that car was thrown how far from the track, or rolled, I will put it?
A. Well, that would be over the right-of-way fence, I don't remember now what the right-of-way is, there are different widths. That right-of-way is bought from different——
Q. (Interrupting.) Take these two (photographs)—it will show (handing photographs to witness)?
A. Well, I wouldn't like to say. I don't remember, and I don't really like to say, but I think thirty-five or forty feet, though.
174 Q. And, how high is your bank down there, down which this car rolled?
A. Well, that embankment, I should say, is twenty feet.
Q. High?
A. I should think so.
Q. Now, do you know how—can you approximate, from you- own knowledge of the situation, as you saw it, how many times that day-

coach would turn over, to reach the position shown here at the edge of the right-of-way, and in that corn field?

A. That is pretty hard to tell, I don't believe I could.

Q. It would turn over at least once and a half?

A. Yes, it might, and might turn over more than that.

Q. It might turn over more than that?

A. Yes.

Q. Did you examine it—did you examine the inside of that coach, day-coach?

A. Yes, sir——

Q. (Interrupting.) It is a fact——

A. (Interrupting.) —that is, I looked in it, but I was not inside of this day-coach.

Q. It is a fact that the violence of the wreck, on that car, was sufficient to smash out the windows, to strip the running gear from it, as shown in that picture, entirely?

A. That is right, well, I wouldn't say it smashed all the windows. I don't remember that. Of course, it stripped the running gear.

Q. And, it threw the wheels even further over in the cornfield, than the body of the coach?

A. Yes, they were thrown further, yes, sir.

Q. How wide is that river there?

A. I don't remember; I didn't pay any attention to it.

175 Q. What is the river known as, do you recall?

A. No, I don't; I don't really recall.

Mr. Hogsett: That is all.

Redirect examination by Mr. Thomson:

Q. Mr. Ritchey, so that we may all know about the relation between the railroad company and the director general of the railroads, has the Chicago Great Western Railroad Company, duties, or obligations, as a road, in the operation of trains during the federal control?

A. I didn't just get your point, Mr. Thomson.

Q. Did the expenses from the operation of the railroad company, during the federal control, go to the railroad, or were they paid out by them, or was that handled by the Government, through the director general?

A. That was handled by the Government through the director general, as I understand it. Of course, I am not——

Q. (Interrupting.) —you know, in a general way?

A. Yes, sir; I know, in a general way.

Mr. Thomson: That is all.

Recross-examination by Mr. Hogsett:

Q. And, the earnings over expenses, were paid by the Government, or director general to the railroad *railroad* company?

A. That was the arrangement.

Q. And that is where your stockholders got their dividends, if any?
A. Yes, if any.
Q. Yes—that is all.

Redirect examination by Mr. Thomson:

Q. Did the stockholders of the Chicago Great Western
176 Railroad Company get any dividend, one way or the other?

Mr. Hogsett: Objected to, as immaterial.
The Court: Sustained.

To which action and ruling of the court the defendant, by its counsel, then and there at the time duly excepted, and still excepts.

Mr. Thomson: I think that has been gone into by Mr. Hogsett.
Mr. Thomson: That is all, Mr. Ritchey.

(Witness excused.)

Miss MARIE TOMPSON, of lawful age, being produced, sworn and examined, on the part of the defendant, upon her oath testified as follows:

Redirect examination by Mr. Thomson:

Q. State your name, Miss Tompson?
A. Miss Marie Tompson.
The Court: Have you been sworn?
The Witness: Yes, sir.

Mr. Thomson:

Q. Are you related in any way to me, the Mr. Thomson who is examining you?
A. No, sir.
Q. You spell your name differently?
A. Yes, sir.
Q. I spell mine (spelling), T-h-o-m-s-o-n?
A. Yes, sir.
Q. What is your business, Miss Tompson, or your work?
A. I am executive secretary of the Red Cross, for Andrew County.

177 Q. Have you any business connection, or have you had with the director general of the railroads?
A. No, sir.
Q. Did you have occasion about the third day of January, 1920, going to the scene of a wreck, near Wyeth, Missouri?
A. Yes, sir.
Q. What time of the day did you go—did you arrive there?
A. I don't know exactly. It was between seven and eight o'clock, rough, in the morning.

The Court: Speak distinctly, so the jurors can hear you.

Mr. Thomson:

Q. And, where were you located then—where did you go from?
A. Savannah.
Q. How far is Savannah to the place of the wreck?
A. I don't know.
Q. A few miles or——
A. (Interrupting.) Just a few miles.
Q. And, when you got there, were there any doctors there?
A. Why, there were two that were on the train, that I know of.
Q. Well, do you know whether or not there were other doctors, or other people attending to any person injured there?
A. Yes, sir.
Q. Now, can you give us an idea, during the morning—by the way, how long did you stay there, Miss Tompson?
A. I went on the first relief train, and left on the first relief train to St. Joe.
Q. You went there to assist?
A. Yes, sir.
Q. And, how many people were there assisting, while you
178 were there?
A. Well, I was personally acquainted with eight doctors.
Q. And how many nurses were there, do you know about?
A. There were five from the sanitorium at Savannah.
Q. And, were there others, in addition to those?
A. I met the St. Joseph nurses, in Savannah, on their way there.
Q. Now, while there, what did you do—give attention to any person who seemed to need or request attention?
A. Yes, sir.
Q. Do you recall Mr. Wechsler, Mr. George Wechsler, who sits at the end of the counsel table here (indicating)?
A. No, sir.
Q. That is all.

Mr. Hogsett: No questions.

(Witness excused.)

Miss Mae L. Cash, of lawful age, being produced, sworn, and examined, on the part of the defendant, upon her oath testified as follows:

Direct examination by Mr. Thomson:

Q. State your name, please, Miss Cash, loud enough for the jury to hear?
A. Mae L. Cash.
Q. And, where do you live, Miss Cash?
A. St. Joseph, Missouri.
Q. Are you engaged in any business?
A. I am a graduate nurse.
Q. Did you go to the scene of a wreck, near Wyeth, Missouri, on January 3, 1920?

A. Yes, sir.
179 Q. Where were you, when you first heard of it?
A. I was home, at my home.
Q. In St. Joseph?
A. Yes, sir.
Q. And, when did you leave there?
A. For Wyeth, it was between seven and eight, as near as I can remember.
Q. In the morning?
A. Yes, sir.
Q. And, why did you go, to assist as a nurse?
A. Yes, sir.
Q. And, did you assist when you were there?
A. Yes, sir.
Q. How many doctors or nurses that you knew, or knew of, were there, while you were there?
A. At Wyeth?
Q. Yes.
A. There were three, I knew personally.
Q. Three doctors?
A. There when we arrived.
Q. And, were any doctors along with you, when you arrived on this train?
A. Yes, sir.
Q. About how many of them were there there then?
A. There was four, that I knew personally.
Q. And were there other nurses, or other people there that were on the train to assist?
A. Yes, sir; there were four other nurses went when I went.
Q. Were you and the others there, sufficient in number to give treatment to every person there, who seemed to need or who desired treatment?
A. Yes, sir.
Q. And, did you treat every person who seemed to need it, or desired treatment, medical treatment?
A. Yes, sir.

Mr. Thomson: That is all.
180 Mr. Hogsett: That is all.
Mr. Thomson: Wait just a moment—yes, that is all, Miss Cash.

(Witness excused.)

H. P. Leigh, of lawful age, being produced, sworn and examined, on the part of the defendant, upon his oath testified as follows:

Direct examination by Mr. Thomson:

Q. State our name, please.
A. H. P. Leigh.
Q. A little bit louder, Mr. Leigh.

A. H. P. Leigh.
Q. What is your business?
A. Chief yard clerk.
Q. Working now for the Chicago Great Western Railroad?
A. Yes, sir.
Q. Were you, during the federal control, in the employ of the director general of railroads?
A. Yes, sir.
Q. In the same general capacity?
A. Yes, sir.
Q. Where were you stationed?
A. At the shops, yard office, St. Joe.
Q. Were you stationed there in January, 1920?
A. Yes, sir.
Q. Do you recall a wreck near Wyeth, on that date, January 3, 1920?
A. Yes, sir.
Q. Just state what you did?
A. Well, I didn't, I never arrived until eight A. M., on the job, you see. I work eight hours. And the wreck occurred about my time to go to work, but arrived at eight, and in the mean time, the wrecker had been called, and the relief had been called to go to Wyeth and when they arrived at the yard, they put the
181 road crew on to it and ordered me to go with them, that there was—I never did get clear to the wreck.
Q. When—you did not go to it?
A. I never got clear to the wreck. I never got any further than Savannah, Missouri.
Q. Did you go where the people were, that had been passengers on the train?
A. Yes, sir.
Q. How far was that from the scene of the wreck itself?
A. It was in the neighborhood of about six miles.
Q. Well, how far was it from the wreck, to where—or did you go to where there was a fire, with fifteen or twenty—twenty-five people standing around?
A. I never seen that at all.
Q. You didn't go there?
A. No, sir.
Q. Did you have anything to do with the train that left the wreck, about twelve or one o'clock, I believe, referred to as the second relief train?
A. I met them at the Third Street Station, 129 at St. Joe.
Q. And, who was with you then?
A. Miss Tompson was with me at the Third Street Station, and Miss—two other young ladies that were there.
Q. Who were they?
A. Miss Lester and Miss Lawson.
Q. And what did you do then, with respect to the people on the train?

A. Well, Mr. Ritchey ordered me aboard that train, to go to the Union Depot with them.

Q. Tell what you did.

A. As soon as we arrived at the Union Depot, we under-
182 took to feed everybody, go to them, and see if they wanted any medical attention, or if they wanted to eat, we took them to the dining room, and the people that needed any medical attention, we sent to the hospital in a taxicab.

Q. Did you and your associates inquire among the people, to identify any person that was injured?

A. No, we never was up against anything of that kind, that we needed anybody to identify.

Q. Sir?

A. We never was put up against anything that we needed anybody to be identified for.

Q. Here is what I mean: Did you and your assistants—did you and those with you, go among the people to see whether there was any people that needed attention or assistance?

A. Yes, sir.

Q. And, any person that requested any treatment or attention was given attention—was that given?

A. Yes, sir.

Mr. Thomson: That is all.

Cross-examination by Mr. Hogsett:

Q. How many people were hurt in that wreck, do you know?

A. Well, I have no way of telling, just exactly. I was on the first relief train that came from Savannah, I think I had ninety-eight cases, but I don't know just exactly how many was on the second train.

Q. Well, if a like number were on that, that would be nearly two hundred?

A. That would be—I would estimate it in that neighborhood.

Q. Some people were killed, were they?

A. No, there was nobody killed outright.

183 Q. They died?

A. They died at the hospital.

Q. They died that day?

A. Along in the evening. I don't remember just exactly the hour they died. It was in the evening, though.

Q. You found lots of people that were cut and bruised and were apparently not hurt seriously, as far as you could tell, at that time.

A. Yes, sir.

Q. And you found others that were hurt, obviously and seriously, at that time?

A. Yes, sir.

Q. And, they got preferred attention?

A. They got ambulance attention, as soon as they arrived at St. Joe.

Mr. Hogsett: That is all.

Redirect examination by Mr. Thomson:

Q. Those people that Mr. Hogsett inquired about, that were cut and bleeding, though not seriously injured, did they receive medical attention?

A. Just the same as the rest of them.

Q. Were there sufficient people with you—were there sufficient people with you, in the way of doctors, and nurses, to treat everybody that was bleeding and hurt?

A. They were rushed to the hospital in taxis, and ambulances. Every taxi and ambulance in St. Joseph was used, to meet the requirements—police ambulances, and all.

Q. Were there doctors and nurses there, stationed there, to treat every person that was injured?

A. At the hospital, you mean?

Q. Sir?

A. At the hospital, you mean?

Q. Were there enough people around the station to in-
184 quire about and locate such people?

A. There was such a confusion there, that you had a lot of trouble locating anybody. We had a time driving the sightseers away from the people, but everybody was rushed to the hospital, and at the hospital they were given medical attention there, but I lost track of everybody else around there, the crowd was so bad, you had to have the police to keep them off of you.

Q. Now, Mr. Leigh, do you recall seeing, in that connection, or having any request made to you, or conversation with you with regard to any treatment, by Mr. Sam (George) Wechsler, who sits at the end of the table (indicating plaintiff)?

A. I never saw the gentleman, to my knowledge.

Q. "Sam"—I meant to say Mr. George Wechsler, that sits at the end of the table (indicating)?

A. I never seen him, to my knowledge.

Mr. Thomson: That is all.

Recross-examination by Mr. Hogsett:

Q. How big is that station in St. Joseph?

A. The Third Street Station?

Q. Yes, where you were—were you at the Third Street Station only, or both?

A. You mean, to meet the second relief train?

Q. Were you at both stations, at one time or another?

A. No, the first train, we stopped and took everybody out at Third Street——

Q. (Interrupting.) Yes.

A. (Continuing:) And the second train we stopped and got the ambulance cases out of it, and then we went to the Union Station.

185 Q. You mean the crowd was so dense, you had to have the police?
A. That was on the arrival of the first train.
Q. Was there a crowd at the Union Station?
A. No, there wasn't the excitement at that time, they put——
Q. (Interrupting). I beg your pardon.
A. (Continuing:) In fact, the people didn't know they were going down there, you know.
Q. The excitement in this thing brought a lot of people there to the station as sight-seers?
A. Yes, sir.
Q. And they mingled with the people who were hurt, and you, as you just stated, couldn't keep track of who was hurt, and who wasn't—nobody on earth could, could they?
A. Not in that gang.

Mr. Hogsett: That is all.

Redirect examination by Mr. Thomson:

Q. Mr. Leigh, do I understand that condition obtained at the first station you got off?
A. That was the first train, not the second train.
Q. What was the condition at the Union Station, when you got off the second relief train?
A. It was normal down there, just the same as it was any day in the week.

Mr. Thomson: That is all.
Mr. Hogsett: That is all.

(Witness excused.)

186 Miss MARIE LAWSON, of lawful age, being produced, sworn and examined, on the part of the defendant, upon her oath testified as follows:

Direct examination by Mr. Thomson:

Q. State your name, please?
A. Miss Marie Lawson.
Q. Can you speak just a little louder, please?
A. Miss Marie Lawson.
Q. Miss Marie Lawson?
A. Yes, sir.
Q. And, where do you live, Miss Lawson?
A. St. Joseph, Missouri.
Q. Are you employed there by the Chicago Great Western?
A. I am.
Q. In what capacity?
A. In the cashier's department.
Q. And did you have the same general position with the director general, while the road was under federal control?

A. I did.
Q. And, you did in January, 1920?
A. Yes, sir.
Q. Did you go to the scene of the wreck, near Wyeth, Missouri, on January 3, 1920?
A. I did not, no, sir.
Q. Did you have anything to do with the second relief train, that left there, between twelve and one o'clock?
A. I boarded the train at Third Street Station.

Mr. Hogsett: Speak a little louder, so the girls can hear it.
The Court: Speak out, don't be afraid.

187 Mr. Thomson: You boarded the train at the Third Street Station, at St. Joseph?
A. Yes, sir; I did.
Q. And rode on the train to what point?
A. Union Station Depot.
Q. What would you say, Miss Lawson, as to the condition in the Union Station, when you arrived, and when the passengers got off at, to the people around there—was there a normal condition—was it normal, or not?
A. Yes, I think it was—it seemed to be.
Q. For what purpose did you get on the train?
A. Why, I got on the train at Third Street, to see everybody was cared for, and they were going to feed the people.
Q. Did you see everybody who apparently needed, or requested attention, on that train, received it?
A. Yes, sir; there were ladies and little babies, and we helped them carry their suit cases, and bags, and saw that they got in the depot, and were fed.
Q. And, were you and your associates there, able to get around and give any personal attention that was needed?
A. Yes, sir; we were.
Q. (Continuing:) —or requested there?
A. Yes, sir.
Q. And, did you have anything to do with the passengers having their meals at St. Joseph, when they arrived?
A. Yes, sir; we helped them get seated.
Q. Now, where was the meal served?
A. It was served in the dining room of the depot.
Q. In the station?
A. Yes, sir.
188 Mr. Thomson: That is all.
Mr. Hogsett: That is all Miss Lawson, thank you.

(Witness excused.)

Miss CECELIA LEITER, of lawful age, being produced, sworn, and examined, on the part of the defendant, upon her oath testified as follows:

Direct examination by Mr. Thomson:

Q. State your name, please?
A. Cecelia Leiter.
Q. Where do you live, Miss Leiter?
A. St. Joseph, Missouri.
Q. And, are you in the employ of the Chicago, Great Western Railroad Company?
A. Yes, sir.
Q. In what capacity?
A. In the cashier's department, freight office.
Q. Did you have—were you in that department, doing approximately the same work, under the director general of railroads, while the railroads were under federal control?
A. Yes, sir.
Q. And, that was true in January, 1920?
A. Yes, sir.
Q. Did you meet the second relief train, that came from the wreck near Wyeth, on January 3, 1920?
A. I did.
Q. Where did you meet that?
A. The Third Street Station.
Q. You were with Miss Lawson at that time?
A. Yes, sir.
Q. And, you and she worked together there then, and assisted?
A. Yes, sir.
189 Q. Did you and the others present, make any inquiries around, from people — showed any evidences of being injured?
A. Yes, sir.
Q. Were there a sufficient number of you there, to take care of, and provide treatment for any person who apparently was injured, or required t-eatment?
A. Well, I couldn't say as to that, I only know just the ones from the office.
Q. I beg your pardon?
A. I just know the others that were in the office—I don't know——
Q. (Interrupting.) You mean, you don't know how many other people were there giving assistance?
A. No, sir.
Q. Did any person indicate to you, or so far as you know, to any person there, giving assistance, that either desired or needed medical attention, that didn't receive it?
A. No, sir.
Q. Did you see anybody there who was bleeding and apparently injured that didn't receive medical attention?
A. I did not.

Mr. Thomson: That is all.
Mr. Hogsett: That is all.

(Witness excused.)

Colloquy Between Court and Counsel.

(Whereupon a short recess was declared by the court, after which time the following proceedings were had outside of the hearing of the jury:)

Mr. Thomson: In the absence of the jury, it being a question in which no issue of fact, as I understand, is concerned, and nothing for the jury to pass on, I desire to state to the court that this
190 petition was originally filed, with a prayer for damages in the sum of fifteen thousand dollars. Thereafter and in due time, the defendant filed a petition and bond for removal of the case to the Federal Court, and I, as attorney for the defendant, talked with Mr. Hogsett, attorney for plaintiff, and called his attention to a ruling theretofore made by Judge Van Valkenburgh, in the Federal Court, of the Federal District Court, in this county and district, wherein Judge Van Valkenburgh held that the diversity of citizenship existed in a case, so far as the question of removal was concerned, when the parties were residents of different states, although both parties were non-residents of the state and district where the suit was pending. That thereupon Mr. Hogsett stated that if I would withdraw my petition and bond for removal, he would amend the prayer of the petition, so that the damages prayed for would be three thousand dollars, instead of fifteen thousand dollars. Thereupon I withdrew the petition and bond for removal, and the plaintiff's petition was amended, asking judgment and damages for three thousand dollars, instead of fifteen thousand dollars, and thus the case remained for some time. Thereafter, Mr. Hogsett stated to me that the United States Circuit Court of Appeals, of this district, had then recently held that diversity of citizenship did not exist for the purposes of removal, unless the plaintiff was a resident, and the defendant a non-resident of the state wherein the suit was pending, and cited me to the decision to which he referred. He thereupon advised me that he intended to amend his petition again
191 raising the amount prayed for to fifteen thousand dollars, to which I objected. This amendment was made and I thereupon filed a motion in this court, and in division one thereof, asking that the amendment raising the amount prayed for from three thousand to fifteen thousand dollars be stricken out, a copy of which motion is in the records of this court in this cause. This motion was, over the objection of the defendant, overruled by the assignment division of this court, Judge Buckner then sitting, to which ruling the defendant then and there excepted, and still excepts. (To Mr. Hogsett:) Did you hear that Mr. Hogsett?

Mr. Hogsett: I will answer your statement.

The Court: Are you asking for this court to pass on it.

Mr. Thomson: I now ask this court to restrict this jury, by requiring the amendment of the petition by plaintiff to a maximum amount prayed for of three thousand dollars; and that this case be submitted by this court to the jury under the principle that the maximum liability, in any case, of this defendant in this case, is three thousand dollars.

Mr. Hogsett: In response to the suggestion of counsel, statement of counsel, I call the attention of the court to the recent decision of the United States Circui- Court of Appeals, for the Eighth Circuit, reported in 266 Federal, page 614, holding authoritatively that this case is not removable, and never was removable. The only agreement made between counsel for plaintiff and counsel for defendant, was that if he would withdraw his petition for removal, we
192 would decrease the amount sued for to three thousand dollars. This agreement was carried out by both sides. Since then, the Circuit Court of Appeals has handed down this opinion, and from that opinion it appears that the case was not removable in the first place, and is not removable now, and never was removable. Our position is that we have a perfect right, both legally and morally, to increase the amount sued for under these circumstances. I call the attention of the court further, to the fact that all of the facts stated by counsel for defendant, were embodied in a motion to strike out plaintiff's amendment to his petition filed herein on December 1, 1920, at the November term, 1920, and that the same were submitted to the assignment division, and argued at length, and that court, another division of this court, held that the motion was not well taken, and the motion was then and there overruled. So that the matter now sought to be raised again, has been passed on adversely to the defendant. In addition to that, I call the attention of the court to the fact that, following that ruling by the assignment division, the defendant filed an answer to the merits of the petition, as amended, and thereby waived any prior question sought to be raised by the motion to strike. In addition to that, I desire to call the attention of the court to the further fact that three days ago, or about three days ago, when the order was made, substituting John Barton Payne, agent designated by the President under the Transportation Act of 1920, the defendant, Payne, entered his appearance, and adopted the answer theretofore filed by Walker
193 D. Hines, the former defendant, and again waived any question sought to be presented by the former motion, so that the matter is no longer before the court, and could not, under the issues now raised, and now framed, be before the court, during the trial of this case.

Mr. Thomson: The position of the defendant is that the question of whether the case was originally removable to the Federal Court, or was later removable, was not in the case, after the withdrawal of the petition and bond for removal, under agreement between counsel, and the amendment made, reducing the amount to three thousand dollars; that the case then rested upon this agreement, as stated, and not upon whether the case was in fact removable or not.

The Court: The motion by the defendant will be overruled.

Mr. Thomson: Exception.

To which action and ruling of the court the defendant by its counsel, at the time then and there duly excepted and still excepts.

(Whereupon the following proceedings were had within the hearing of the jury, the jury having resumed their seats in the jury box, after adjournment for recess:)

Dr. B. H. MILLER, of lawful age, being produced, sworn and examined on the part of the defendant, upon his oath testified as follows:

Direct examination by Mr. Thomson:

Q. State your name, please?
A. B. H. Miller.
194 Q. Where do you live?
A. I live at Blocton, Iowa.
Q. Were you on the train, the Chicago, Great Western Railroad, on January 3, 1920, that became derailed?
A. Yes, sir.
Q. Where did that occur?
A. I should judge about a mile out of Wyeth.
Q. Missouri?
A. Yes, sir.
Q. What place in the train did you occupy?
A. Well, I was in the—I was in what they call the day-coach, the passenger coach. The first car that went off the track, the head car went off the track, supposedly.
Q. How was this coach arranged, with respect to seats—were there chairs in part of it?
A. Yes, sir, chairs in the front part, and the long seats in the rear.
Q. Where were you sitting in the car?
A. I was on the right side of the rear part of the car, I should judge about half way back from the middle to the back end.
Q. What did—when the car was derailed, what did it do, what action did it take?
A. Well, the car ran for some little time upright—that, is, practically upright. Then, it seemed to tip over. They couldn't——
Q. (Interrupting.) Now, what did it do, with respect to whether it was turned over, or sliding down the embankment?
A. Well, at first, I think it slid off the trucks, and then slid down the bank, and turned over.
Q. Were you injured, Doctor?
A. No, sir.

Mr. Thomson: That is all.
Mr. Hogsett: That is all, Doctor.
195 Mr. Thomson: By the way, another question——
Mr. Hogsett: I wanted to ask him one too.

Mr. Thomson:

Q. Were there doctors and nurses and attendants there, shortly after the wreck occurred?

A. In about an hour, I think.

Q. In what number were they there, Doctor, if you remember?

A. Oh, I should judge six or eight, maybe ten finally got there, before the——

Q. (Interrupting.) Doctors?

A. Yes, sir.

Q. Were there nurses there?

A. Yes, sir, there were nurses came from Savannah. There was one nurse on the train, and she helped.

Q. Sir?

A. (Continuing:) There was one nurse on the train in the pullman, that helped me with the bandages. We had some bandages and she bandaged up some people that were bleeding.

Q. Were there, or was there an opportunity, for the number of nurses and doctors and attendants there, to take care of all of the people who were injured, that indicated they were injured, or requested attention?

A. Yes, sir.

Mr. Thomson: That is all.

Cross-examination by Mr. Hogsett:

Q. Doctor, I wanted to ask you, was the train running rapidly or slowly, before the wreck?

A. Oh, it was running a pretty good rate.

Q. About how fast?

A. Well, I am a poor judge of speed, but I should judge thirty-five or forty miles anyhow—I don't know about that.

Q. Thirty-five or forty anyhow?

A. Yes, sir.

196 Q. Well, how much more than thirty-five or forty?

A. I don't know.

Q. Going around the curve there, was it?

A. Yes, sir, a slight curve. It is a long curve, not an acute curve; it is a long curve.

Q. Well, it was going fast enough so that the whole train left the track, except the engine, didn't it?

A. No, sir, they did not. The smoking car ahead, and baggage and mail car didn't leave the track, and there were two cars behind. I think possibly the pictures will show those two cars.

Q. Well, look at those, and say what didn't——

A. (Interrupting.) I didn't go back there, but I could see the cars on the——

(Whereupon Mr. Hogsett hands Exhibits "1" to "6" to the witness.)

A. (Continuing:) —those back here (indicating).

Q. You really can't tell from here, can you (indicating)?

A. I wasn't back there; I couldn't state definitely those cars didn't, but they didn't upset, anyhow.

Q. There are some here (indicating) that are on their wheels?

A. Yes, sir.

Q. That is the picture where the cars are sort of in a zigzag form, Exhibit—what is it—"6" (indicating)?

A. Yes, sir.

Q. Which one were you in, did you say—which one of the day coaches?

A. Well——

Q. (Interrupting.) You said—I believe the other man said there were two?

197 A. The other day coach didn't go off, the smoking car didn't go off. I was in the——

Q. (Interrupting.) Were you in the car that got across the river?

A. Yes, sir.

Q. And, how far beyond the right of way, or track, how far from the track did your car wind up?

A. Where it was stopped?

Q. Yes.

A. Well, it was lying right on the wire fence.

Q. Yes.

A. (Continuing:) —that would be fifty feet from the center of the track.

Q. Fifty feet?

A. Yes, sir.

Q. How steep a grade is that grade, down the embankment?

A. Down from the middle of the track, down to where the car was.

Q. And ordinary slant of a right of way embankment?

A. Yes, sir.

Q. And, about how high was it?

A. Well, I should judge twenty feet—I should judge fifteen or twenty feet.

Q. So, the net result was the day-coach left the track, rode on the rails for some little distance, then seemed to tip over, the way you put it, and in some way, got down that twenty foot embankment, and wound up according to your estimate, fifty feet from the track, is that correct?

A. Yes, sir.

Mr. Hogsett: That is all.

Redirect examination by Mr. Thomson:

Q. Doctor, as I understand, the cars that you thought,
198 your recollection was did not leave the track at all or not shown on any of these pictures at all?

A. They are not shown very plainly there. Now, I didn't go back there at all, but I could see there was cars standing there, that didn't upset.

Mr. Thomson: That is all, Doctor.
Mr. Hogsett: That is all.

(Witness excused.)

Dr. WALTER C. MYERS, of lawful age, being produced, sworn, and examined, on the part of the defendant, upon his oath testified as follows:

Direct examination by Mr. Thomson:

Q. State your name, please.
A. Walter C. Myers.
Q. Where do you live, Savannah——
A. Savannah, Missouri.
Q. And, what is your occupation?
A. Physician and surgeon.
Q. Are you employed by, or do you have any business for the Chicago, Great Western Railroad Company?
A. Only as a company doctor.
Q. During the federal control, were you——
A. (Interrupting.) Yes, sir.
Q. (Continuing:) —the doctor of the director general, having charge of that division of the——
A. (Interrupting.) Yes, sir.
Q. (Continuing:) —Chicago, Great Western Railroad?
A. Yes, sir.
Q. Did you go to the scene of the wreck near Wyeth, Missouri?
A. Yes, sir.
199 Q. (Continuing:) On March (January) 3, 1920?
A. January third.
Q. (Continuing:) January 3, 1920?
A. Yes, sir.
Q. About when did you arrive there, Doctor?
A. Well, I couldn't say exactly. We went on the same train that was wrecked.
Q. How is that?
A. We went on the same train that was wrecked. They brought the engine and coaches that were not off the track down, put them on the side track, and took two box cars, and Miss Thompson, and four or five doctors, and our assistants, and went up on that train.
Q. Do you know, or did you see—how many doctors did you see, and would you say were on the train with you, about?
A. Well, I would have to count them: Myself, Doctor Kelley, Doctor Martin, Doctor——
Q. (Interrupting.) I just want your——
A. (Interrupting and continuing:) Doctor Jeffries—probably four or five, five doctors.
Q. How many doctors were at the place where the passengers were, that were on the train that was wrecked?
A. When.
Q. While you were there?

A. When I came there?
Q. Yes.
A. Nobody but Doctor Miller.
Q. Now, how many doctors and nurses were there during the time *during the time* that you stayed?
A. Well, there were doctors from the other nearby, the little town, three or four miles from there—Rosendale—there were two
200 from there, and us five, would be about seven, besides the nurses.
Q. Were you and the others that were there, sufficient in number to give treatment to any person there who apparently needed treatment, or requested it?
A. I think so, yes, sir.
Q. Did you do that?
A. Yes, sir.
Q. Did you see any person there that showed evidences of injury—was bleeding or otherwise—that did not receive attention?
A. No- that I saw, no, sir.
Q. Were you looking for people of that kind?
A. Yes, sir.
Q. How long did you remain there, Doctor?
A. I stayed there until the passengers that were injured, that we could find—and I went to all the coaches—they opened up this coach. They (the passengers) were still there. There was nobody out of it then, that is only two or three that were just in the end, they had them out, and boarded (placed) them on these two cars that were not destroyed, and took them and started to the hospital with them, and met this relief train from St. Joseph, at Savannah.
Q. And do you recall there being a day-coach on the train?
A. A day-coach on the train?
Q. Yes.
A. Yes, sir.
Q. Did you do anything in connection with that coach?
A. I did.
Q. I am not talking about the smoking car, but the other day-coaches, the other day coach, did you do anything with that car, about going into it?
201 A. I couldn't say about the smoking car. I just remember the position the coach laid in.
Q. I understand from the testimony, that there was a chair—partly chair car, and partly seats?
A. Yes.
Q. Not the smoking car that was on the train?
A. I couldn't say about that.
Q. Well, what would you say with respect to your efforts to treat all persons that were suffering injury there, you and the others in attendance?
A. Well, we had, of course, a number of people. We had the Red Cross bunch, at the little town; we had our bandages, and did the best we could to treat anybody that needed treatment, preparatory to taking them to the hospital.

Q. And, when did you leave the scene of the wreck?
A. I left with the bunch, all of the crowd, all the severely injured, ll we could get hold of, all we saw, I stayed with them, and helped ad them into the ambulance at St. Joseph.
Q. That was what was called the "first relief train"?
A. We met—the relief of this train was the Savannah train, I ent up with; it was the engine that was wrecked, it wasn't the relief ain.

Mr. Thomson: That is all.
Mr. Hogsett: That is all.

(Witness excused.)

02 Dr. B. H. MILLER, of lawful age, having been heretofore duly produced, sworn and examined, on the part of the de-endant, was recalled for further examination, and upon his oath stified as follows:

Further cross-examination by Mr. Hogsett:

Q. Where did you say you lived?
A. Blocton, Iowa.
Q. Where is that?
A. That is *that* the first station in Iowa.
Q. On what line?
A. State Line, Missouri Line.
Q. I know, but what——
A. (Interrupting:) —on the Great Western.
Q. On this——
A. (Interrupting and continuing:) The Great Western road.
Q. Have you any connection with that company?
A. Their local surgeon for a great many years.
Q. That is, the local surgeon for the defendant?
A. Yes, sir.
Q. You didn't mention that while you were on the stand awhile go?
A. You didn't mention it.
Q. Neither did Mr. Thomson?
A. No, sir.

Mr. Hogsett: That is all.

Redirect examination by Mr. Thomson:

Q. You are not in any sense ashamed of being a surgeon for them, e you?
A. No, sir, not at all.
Q. Do you think that the fact you were a surgeon, for the director neral of railroads, had anything to do with your being in that ain, and not being injured?
A. No, sir.

203 Q. Did you do just the same as you would have done with respect to the place there, of being injured, that you would have done if you had no connection at *at* all?

A. I did the same thing, did the same thing I would have done if I was on the ground at all.

Q. Doctor, is there anything that occurs to you, that would in any sense change your testimony, or make you say anything different about these facts you have narrated?

A. None at all.

Q. (Continuing:) —your connection, or non-connection with the railroad company?

A. No, sir, positively not.

Mr. Thomson: That is all.

Mr. Hogsett: That is all.

(Witness excused.)

Dr. JAMES WHITNEY HALL, of lawful age, being produced, sworn and examined, on the part of the defendant, upon his oath testified as follows:

Direct examination by Mr. Thomson:

Q. State your name, please, Doctor?

A. Hall is my name, James Whitney Hall.

Q. And, where do you live, Doctor?

A. I live in Chicago, Illinois.

Q. I will ask you first—what I want to get, what is your connection as a physician, or otherwise, with the Chicago, Great Western Railroad Company?

A. I have no connection with them whatever, never have had.

Q. What is your connection with the director general of railroads, so far as his operation of the Chicago Great Western
204 System is concerned?

A. I never had any official connection with the director general, or with the road. I was delegated by representatives of the director general, to examine and give an opinion on a number of people that got hurt in the wreck that is now under consideration, and in other injuries for the Chicago Great Western, and for other roads, but I had no—it was special work that I was delegated to do. I started before I was out of Government Service, and that has continued since, in cases that haven't apparently been adjusted.

Q. You say your residence is Chicago, Illinois?

A. Yes, sir.

Q. Where did you study medicine, Doctor?

A. I studied, I took my medicial degree first, at the medical department of the University of Kentucky, at Louisville, Kentucky; after taking my literary course at Georgetown, then took a post-graduate course at Rush Medical College, in Chicago, and I afterwards took a post graduate course in the Chicago Polyclinic, in

1900, and I did some special work with Doctor McBurney. I have done some work at Belleview, and St. Elizabeth's Hospitals.

Q. Who was Dr. McBurney?

A. He was one of our great surgeons, especially abdominal surgery. He was the man that made appendicitis famous. They locate the appendix now, by what is known as "McBurney's point," which is a certain measurement we make to locate the appendix, ordinarily.

Q. Doctor, there has been some reference made to objec-
205 tive and subjective symptoms; I wish you would state, briefly, what that is?

A. Well, in making the examination of a patient, especially a physical examination, physicians divide symptoms into two great classes—one called "subjective" and the other called "objective." An objective symptom is a symptom that a doctor can determine, or find out, in spite of the patient. It doesn't matter what the patient does or says, the doctor, independent of anything the patient does or says, can determine that symptom. That illustrates, to illustrate, a broken arm. The doctor, my manipulating the bones can tell they are broken, regardless of what the patient says or does; that is an objective symptom, something that can be determined in spite of the patient. A subjective symptom is one upon which the doctor has to depend upon the patient for, by something the patient says or does. To illustrate, a headache is a subjective symptom. A doctor can't tell whether his patient has a headache, or not, except what he says about it. Pain is subjective; movement of a joint is subjective, under the control of the will of the patient. So, anything that can be controlled by the patient, or modified by the patient, or upon which the doctor has to depend upon what the patient does or says, is a subjective symptom, as contradistinguished from the objective.

Q. What, Doctor, is the formation of a man's head, over and above, over and back of the ear?

A. You mean the anatomical structures?

Q. Yes, sir.

A. Well, it is the same there as other parts of the head.
206 The first, or outside covering, of course, is what is called the scalp, or covering of the bone. Then, over the ear, and surrounding above and at the ear, is a bone called the temporal bone. It joins the parietal and the occipital, and extends down to the base of the skull and forms a part of the base. In that bone is the ear, that is the canal, through which the ear is connected with the brain. That bone is divided up into certain sections and parts. The part that comes up on the skull is pretty thin, very thin, and when it comes down to the part where the canal goes through, it becomes very thick, and is very hard, in fact, it is technically called the Petrous Portion of the temporal bone, "petrous" meaning flint, or hard, solid, flinty-like. And in that bone, the internal middle-ear is contained. Of course, underneath the bone, above the ear, is the brain, and the special part of the brain located just at that

point is known as the motor-area. By "motor-area," we mean the brain centers that control the motion of the body—the two large motor-areas are one on either side of the head, just above the ears, and there are certain centers in those motor-areas that control certain motions of the body. Up high, and pretty well back, is the arm center. An injury to the brain at that point, the left side of the head, would cause a paralysis in the arm on the right side. And below that arm center, is the leg center, very close to it. An injury to the brain, and the motor area of the right side of it—whether the right side or left side, would cause paralysis of the leg on the other side of the body, because the nerve fibres that originate in the motor areas of the brain cross at the base, and supply the opposite side of the body. So, an injury to the left side of the head, in the motor area, if it does any damage at all, would be on the opposite side of the body.

207

Q. What would be the relation, Doctor between the motor area, as you described, on the left side of the head, with the locomotion of the left arm, or left leg?

A. It would not affect it at all. The effect, if any, would be entirely on the other side. The only fibres that don't cross, are the lower facial fibres. Sometimes an injury, low down in the motor area of the left side, will occasion the facial nerve, that supplies the same side of the face, occasionally you will get a partial paralysis of the face, on the same side that the injury occurs, provided it catches the center that supplies the face.

Q. That does not obtain below the face?

A. That does not obtain below the face, and usually does not obtain there.

Q. Yes. Now, Doctor, just indicate where is the location of the middle or inner ear, on the face, or on the head, indicate that, just the longitude?

A. You mean the middle, or internal ear?

Q. Yes, sir.

A. The internal ear is pretty well down in the base. This bone——

Q. (Interrupting.) Maybe it would assist you here, if you would just indicate to the jury?

A. (Continuing.) The middle ear is down. The canal descends, at it goes into the head, and the petrous portion of the temporal bone is a part of the base of the skull, that is, the bottom, and the canal descends, goes down towards the base, so the internal ear is quite distinctly below the external opening in your ear. In other words, it is several inches, that is, two or two and a half inches from the top of the lobe of the ear.

208

Q. Give us, Doctor, a general idea, briefly, of the construction of the kidney, and what significance is or should be attached to the finding, for a short time, of some blood in the urine?

A. Well, a human being should have two kidneys. Most of them have. Occasionally you find a person born with only one kidney, but normally, there are two kidneys, one lying on either side of

the backbone, back behind all of the other organs in the abdominal cavity. The lower end of the kidney, which is about two and three-quarters to three inches long, comes down just below the left rib, just above the hip bone, clear back by the spine, just slightly below the rib, and the rest of the kidney is covered by the ribs, and by the back bone. The kidney is a bean shaped organ, made up entirely of blood vessels, and tubules, that is, small tubes, with some connecting tissues. It is a kind of filtering organ. It is an organ that separates the urine from the contents of the blood. It has, next to the brain, the greatest blood supply of any organ in the body, that is, for its size. It has more blood vessels, and there is more vascular, meaning by that, more capaciously supplied with blood, than any other organ in the body, except the brain. The brain, I think it is estimated, carries about one-tenth of all the blood of the body, and the kidney considerably less, because considerably smaller. The kidney is a very fragile tissue, or
209 tissue easily disturbed or broken, that is, the small fibres or vessels give way more easily. Hence, it bleeds very readily. It is not at all unusual to find blood in the urine following a comparatively slight shaking up, or slight blow, or slight shock. It is a very common thing to find blood in the urine for two or three days, or a week or two, following a shaking up, or a jar, or an injury. It is exceedingly common in prize fighters following a bout, where the blows have been struck over the kidneys, it is an exception not to find blood in the urine, following blows that have been struck, or slight injuries.

Q. Now, can there be blood from the kidneys, indicated in the urine, or something, of an entirely superficial and temporary character?

A. Oh, yes, it is a common thing. It is no more significant than a nose bleed, ordinarily. It is a transient proposition.

Q. Now, Doctor, there has been some testimony concerning the urine being red from the presence of blood. What are the facts about that?

A. Well, the facts are that it doesn't get red from blood. Blood in urine turns urine dark; it becomes brownish, or port wine color, and never red, unless there is more blood than there is urine. A small amount of blood in urine, up to a considerable quantity, turns it dark, or a port wine color.

Q. Did you have occasion, Doctor, some months ago to examine George Wechsler, the plaintiff in this case?

A. Yes, sir.

Q. Where was that examination conducted?

210 A. The first examination I made of Mr. Wechsler, was in Chicago, in the Century Building.

Q. My inquiry, at this time, is just as to the first examination made?

A. Yes, sir.

Q. Just state to the jury what your examination consisted of, what you did?

A. Well, the first step in the examination was to take a history of the case—that is, asking the man about himself, getting his age, and his residence, and his occupation, and his past illnesses, or injuries, if any, and a statement, from that to his connection with the accident, for which he was being examined. That was the first step in the examination. After getting the history, I made some examination of the pulse, respiratory action, respiration and heart beats, before I started on the physical examination, in order to get the respiration, and heart beats at rest, before there was any stress, following the examination.

Q. Doctor, let me interrupt just a minute. To save, possibly it would save repetition, for you to state, as you go along with the examination, and describe the examination you made, what conditions you found in your examination at that time?

A. Well, the heart and lungs and pulse were negative, I mean by that, normal. There was nothing abnormal that I noticed. After that procedure, I had Wechsler remove all of his clothing, and made a complete physical examination. He is a man of medium size, muscular, quite muscular, the muscles are well developed, and good tone, with a little fat, a little adipose tissue; a healthy appearance, skin very clear. The examination of the body, at
211 the general examination of the body, there was no marks or scars, or deformities, limitation of motion of the joints, with the exception of a very small scar, just below the buttocks, just at the crease of the leg, which was transverse. That was a skin scar-line, like there is in attachment or adhesion to the deep tissues. On his back, on the right side, more to the right than to the left, covering the region of the spine, there was a very ugly scar, most as large as my hand, flat, involving the skin and deep tissues. The skin, at that point, is adhered to the tissues underneath. With those exceptions there was no objective sign on the body.

Q. (Interrupting.) Did you——

A. (Interrupting.) Especially—Sir?

Q. Let me interrupt a second: Did Mr. Wechsler tell you anything about this scar on his back, you have referred to?

A. Yes, sir.

Q. (Continuing:) —and how it—when it was received, or how?

A. Yes, sir.

Q. State what he said about that?

A. He said his mother spilled some hot coffee down his back when he was a child, and burned him rather severely—I think he said it was his mother.

Q. He didn't say it had anything to do——

A. (Interrupting.) He didn't say it had anything to do with this accident. A special examination of the nose, and throat, and teeth, disclosed there were some bad teeth; mouth not in a very sanitary condition; a chronic laryngeal catarrh—that is, the back part of the throat quite congested; also a nasal catarrh, with
212 a contraction of the nasal passage; in other words, he was cramped in the nasal passageway. I tested the reflexes of his

pupil, and found them normal—that is, they responded to light and accommodation, both.

Q. What do you mean by testing the reflexes?

A. Well, the reflexes are the keynote to the central nervous system. In other words, the reflex test is a test to determine whether or not the central nervous system was intact, or whether it is operating properly. Now, a reflex is a response to an irritation. I irritated a part of the body, by striking it. I am giving you the wrist reflex now (illustrating by striking wrist). Of course, I am voluntarily doing that, with my own hand, but there is a normal response.

Q. That is, an involuntary response?

A. That is an involuntary response. Also (witness illustrates by striking leg), that is a reflex, and all muscles and tendons of the body have their reflexes. And, the same is true of the eye. By applying light, lighting a match, or throwing an electric light immediately into the eye, the pupil contracts very readily, draws down to a pin-point; the same is true, by darkness, and dilation. So, I did the reflex of the pupils, but I didn't test the vision. There was no complaint of vision. There was no complaint at that time of any hearing defect, and I made no test of his hearing, and discovered no defect in conversation. After this special examination, I made a complete neurological examination—by that, I mean I took his reflexes of his body, tested the reflexes in the front, and back,
and also the superficial reflexes over the abdomen and back,
213 and thighs, and so forth. I found them all present and
normal. There was no—I don't know how many technical terms I can use, I am trying to keep away from that, but what is called ankleclonus—I mean, that is a shaking of the ankle, when you strike against the foot, the foot will quiver. There was no Babinski—by that, I mean a certain plantar reflex. The normal response to irritating the bottom of the foot, is for the toes to come down in the form of a crow lighting on a limb, but in certain diseases of the central nervous system, you irritate the bottom of the foot, the toes come up toward the face. That is called Babinski's reflex.

Q. You found a normal condition?

A. I found a normal condition. There was no romberg; in closing his eyes, there was no shaking or quivering of the body. I had him go through all the motions of the joints, including the spine, giving him both anterior rotary, and lateral movements of the spine, having him go to the floor with his hands, and back as far as he could come, and to the side. There was no restriction of the motion. The spine was in alignment. I then made an examination for displacement, or disturbance of the kidneys. I was able to palpate, or feel the right kidney. I was not able to feel the left one, which is entirely normal. The right kidney is lower than the left, normally under the liver, pushed down. I found nothing weakened or anything abnormal from his kidneys, in an examination.

The Court: Gentlemen, we will now adjourn until two o'clock P. M.

214 (Whereupon, the noon adjournment was duly had, and thereafter, at the hour of two o'clock P. M., of this day, came the same parties, and the following proceedings were duly had:)

Dr. James Whitney Hall, of lawful age, being produced, sworn and examined, on the part of the defendant, resumed the stand pursuant to adjournment had, and upon his oath testified as follows:

Further direct examination by Mr. Thomson:

Q. I believe, Doctor, my inquiry was directed to, and your answers in regard to the examination, were made only with respect to the first examination made of Mr. Wechsler, that is correct?

A. I think so, sir.

Q. Now, have you anything further with regard to that examination, that occurs to you, that was not covered, that has not been covered by my inquiries?

A. Well, except this: That at the conclusion of the examination, I mean, the physical examination, I again took his pulse and respiration, and heart-beats, on the theory that a physical examination, especially having one stripped, taking the reflexes, and testing the motion of the joints, if there is a tendency to any neurosis, or any nervousness, the examination accelerates the involuntary functions, like the heart beats, and respiration, and so forth. In other words, it is the test that we use for determining the stability of the nervous system.

Q. What did you find his temperature to be, after the physical examination, with respect to being normal?

A. You mean, his pulse rate?

215 Q. Yes, sir.

A. It had not changed, there was nothing abnormal about the condition. It was the same.

Q. Did you later make another examination of the plaintiff?

A. Yes; I examined him yesterday.

Q. I wish you would state what that examination consisted of, and what you found?

A. Well, the examination was practically a repetition of the examination I made in Chicago, except I took no history. I did, however, ask him something about his recent complaints in my examination yesterday, and then I weighed him, measured his height. He weighed approximately one hundred and fifty pounds—a fraction less—one hundred and fifty-nine and one-half, three-quarters——

Q. 159½?

A. (Interrupting.) One hundred and forty-nine and a half, I mean; his height sixty-seven and one-half inches. I then had him remove his clothing, went over the body again, took his reflexes again. The only additional examination I made in this case, over that that was made in Chicago, as I recall it, I made a special examination of the ears in this case, with a mirror, a head mirror, and artificial light. Also, his throat and nose, with the same kind of an examination. The man is still well nourished, and still muscular;

his muscular tone is good, and he is still void of any fat, to speak of, no excess fat. There are, at the present time, no limitations of motion of any of the joints or limbs, or motion of the back; no evidence of anything abnormal, except the infection in his throat and nose; his hearing, under the voice test, there was nothing to indicate there was any deafness. Now, by the "voice test," I mean this:

216 In examining the ears, without the patient knowing it, block one ear with your fingers and talk in the ordinary voice, and if they respond, you know they hear you. This is done during the process of the examination, without calling the patient's attention to it—that is, in order to avoid any will power, that might be exercised. This patient had no difficulty in hearing me in an ordinary tone of voice, as I talked to him with one ear blocked at one time, and the other blocked at the other. Then, I examined his ears. Both of them were quite blocked up with wax, the left one, particularly. I removed from the left ear, quite a chunk, or cake of wax, with a probe wrapped with cotton.

Q. Did you show that to Mr. Wechsler?

A. Yes, sir. His reflexes are still normal; there was nothing found abnormal in the case.

Q. Doctor, in making the ordinary thorough examination, did you take into consideration the injuries which the patient had, or the injuries which he pretends, and the injuries which he imagines—all three?

A. Well, in making a diagnosis, you take into consideration the history of the case, from every phase of it.

Q. Do you keep the three phases that I have mentioned, in mind?

A. Well, yes; in a very general way. Personally, I don't classify them quite that way. The main classification, of course, is subjective and objective conditions. Now, the objective, we, of course, consider as indicating certain definite things. The subjective are always open to conclusions and theories, unless you are able to demonstrate

217 positively, as you are in many cases, that they are not genuine. Take the case of pain. Now pain is considered, and is, a subjective symptom, but you can modify them, by certain tests. There is a test in medicine, known as Mancoff's test, that comes more nearly, or as nearly as any test could, in determining whether the complaint of pain is genuine. Mancoff's test consists in irritating by pressure, or manipulation a part that is supposed to be painful. For instance, if I complain of pain in my elbow joint, at movement of the joint, the physician takes my arm, and violently moves the joint, at the same time testing the pulse. If the pain is genuine, the pulse becomes quite accelerated; if it is not genuine, and there is no pain there, the pulse is not affected. Now, that test is not entirely reliable in all cases, because there is a vast difference in the temperament of different individuals, a vast difference in the ability of individuals to stand pain. Those that have a passive nervous temperament, the pulse is not so much affected as those in the irritable people. So, that is the modification of the test.

Q. Now, Doctor, did you examine the plaintiff at and around the left hip?

A. Yes, sir.

Q. What did that particular examination consist of?

A. It consisted of having him move the hip joint, by standing with his legs fixed, and bending on his hip, back and forth. It consisted in manipulating the hip joint; it consisted in inspecting the hip joint, looking at it—I mean, the hip muscule. It consisted in palpation—by "palpation" I mean feeling, manipulation, inspection and motions. There is no atrophy—I mean by that
218 there is no shrinking of the muscles in the hip or leg. They are symmetrical, both sides. There is no deformity; there is no limitation of motion; there is nothing objective about this man's hip joint that would indicate there is pathology, or anything wrong with them.

Q. Did you make any tests with respect to pain at that place?

A. Well, only such as I could make by pressure and manipulation.

Q. And did you find any abnormal condition there?

A. None, whatever.

Q. Doctor, suppose a man twenty-four years old—about twenty-four years of age, having been, before that, prior to the time in question, living in the country; that he was riding on a train, and that the train became derailed, and the car in which he was, turned over and went down an embankment fifteen or twenty feet high, and the car rested possibly thirty or thirty-five feet from the rails; suppose this man had received a cut, at or near the ankle, a bruise at or near his hip, and a cut over and back of his left ear; and that after this accident—that after being taken out of the car he stood about a half hour, or such a matter, before a fire that was built near there; and then sat down on a box, or a dress suit case, near the fire, and sat down a while, and walked around a while, from about seven-thirty in the morning, until noon, or one o'clock, and then got on a train and rode twenty-five or thirty miles, and after he arrived at destination, went in and ate a meal; sat around the station for some two or three hours, and then got on another train, and rode
219 for an hour or two; on arriving at destination, he, with his grip or suit case in hand, walked from the elevation of the train at the Union Station, in Kansas City, Missouri, up the steps out through the station and got in an automobile, went a few blocks in the automobile, and then got out and made arrangements with regard to tuition and adjustment of his enrollment in an automobile school, and then, after that, he got in the automobile, and went out to a boarding house, walked in, carrying his grip, went up to the second story, undressed, and went to bed, and feeling stiff and sore, remained in bed, except for his meals, got up and dressed for his meals and ate in bed some of the time for three or four days, and then attended an automobile instruction school, losing some time from that, but enabled, within the prescribed time, to complete the course of automobile mechanics, and get his diploma; and thereafter, that he went from Kansas City, Missouri, to at or near Prairieville, Illinois, was not engaged in business for approximately

month, and at the end of that time, opened an automobile repair shop and garage, selling parts of automobiles and repairing automobiles; that he continued in that business, alone, and without assistance, opening his office (shop) at seven o'clock in the morning, to sell parts of automobiles, and later repairing cars, repairing cars, as they came in, without, as I say, any assistance there; kept his place of business open until about 8 or 8:30 in the evening, and continued at that business for approximately a year, and still continues it. Under those circumstances, Doctor, if this man claimed that he had attacks of dizziness, and semi-consciousness, which de-
220 veloped about three months after the accident, and continued, from time to time, after that, having, as I say, this dizziness and semi-consciousness, could, in your opinion, any such claimed dizziness, or unconsciouness, or such spells, be attributed to the injury which I have described, and which we presumed that he had received at the time I stated?

A. The same man I examined?

Q. Yes, sir.

A. No; there could be no connection between that kind of an injury, and the dizziness coming on three months afterward. The conditions described, dizziness, and vertigo, headaches, coming on recurrent, is a question of disease, and not injury.

Q. Such attacks, as I have described, and claimed by plaintiff, you say—could they have been the result of injury, or disease?

A. It is a question of disease, always. The dizziness you get from an injury, you get an injury, it produces an unconsciousness, either from shock or from concussion. Coming out of the unconsciousness, there is frequently, and usually is a dazed period, in which they have vertigo, and confusion, sometimes almost maniacal. Now, if there is a lesion to the brain that produces an actual pathology, that condition is constant, until that lesion heals, until it disappears. It is just like having a gravel in your shoe. As long as it is there, and you are stepping on it, it is going to hurt you, and will continue to hurt you until you take it out of your shoe; so, if there is an injury, if there is a lesion, if there is an actual break in the tissue, these conditions are not recurrent, they are constant. Recurrent
221 attacks of vertigo, and the pain, is a disease, and in practically, in practically all cases, it is found to exist in the ear.

Now, Doctor, what, in your opinion, could be the effect in weight, of a young man, twenty-four years old, leaving the farm going to a city, taking a six weeks' course in automobile mechanics, and, after completing that—well, just to the coming part, first: The coming and staying without—for a few days in the house, dressed, down to meals, but not going out for three or four days, and later taking a six weeks' course in automobile mechanics, what, Doctor, could be reasonably expected in regard to any changes of his weight, due to those changes that I have mentioned?

A. All I could say on that subject is that frequently change in work, occupation, change in environment, and change in habits, frequently change the weight. Some people get fat; others get thinner. But what effect would be, what effect it would have on a certain

individual, I don't know. This man that I examined, his weight was all right; he has got good nutrition, good muscle and a little fat. Now, whether his change from the farm work, or different kind of work, would make him thinner, I don't know. It might in some cases; in other cases they get fat. I can only say there is a change frequently, from one to the other.

Q. Well, Doctor, does the change of weight, so far as the fat is concerned, without affecting the muscles, necessarily affect the health?

A. Well, often times it benefits. If one is too fat, and got rid of about forty pounds—speaking of myself, I think I would be in
222 better condition, in better shape. The loss of a certain amount of fat, I mean, unless it is an excessive amount, where there is a rapid change, like some of the wasting diseases, it is not of any significance; where the weight changes gradually, for a few pounds, on account of change of condition, it is not at all significant.

Mr. Thomson: That is all.

Cross-examination by Mr. Hogsett:

Q. Doctor, how much of your time is taken up by railroad companies?

A. Well, I don't know what you mean by "taken up." I have done considerable work for railroads.

Q. How many?

A. How many railroads?

Q. Yes.

A. I don't think I could answer that, I have been called by the various railroad companies that come into Chicago. I have been called since the federal administration, by some that don't come into Chicago.

Q. Well, how many railroad companies have you been employed by regularly, more or less regularly?

A. I never been employed by any railroad regularly, with the exception of for two years, I was surgeon for the Chicago & Alton Road. That is the only official connection I have ever had with any railroad company.

Q. Aside from the——.

A. (Interrupting and continuing:) I have been called by various roads, where there was an injury, or medical or surgical question involved, and where an examination was to be made.

Q. How many roads have you done that for?

A. I couldn't tell you.

223 Q. Fifty?

A. I don't think there are fifty different roads in the city.

Q. You don't limit your practice to Chicago, do you, you are in this western country generally?

A. No, that isn't true generally. I have been out frequently since this wreck, as I testified this morning, I have been out attending a number of people that were in this wreck, and I have attended some trials in St. Joseph, but I am not generally out west.

Q. You were at Oklahoma City with Mr. Grimes?

A. I was at Oklahoma City last summer, and examined a case.

Q. That was Mr. Grimes (indicating) an attorney for the defendant?

A. Yes.

Q. And, you go out of Chicago on other cases for the railroad companies?

A. Yes, I have been out of Chicago in a number of cases for this road, and other roads, where they wanted my opinion of the condition. The fact is, I devote my whole time, almost, for physical examinations, and consultation work.

Q. And most of it for the railroad company?

A. No, that isn't true.

Q. And, you are out of the city a great deal?

A. Yes, sir.

Q. And, on railroad company work?

A. Since the federal administration.

Q. I don't care when it is, your time is largely taken up by the examinations and consultations for railroad companies, and taken up with, and you are an experienced expert in railroad cases, an expert witness?

224 A. I might leave that to you, as to whether or not I am an expert. I do examine cases and give opinions, but it isn't, by any means, a large part of my work.

Q. You wrote this letter (handing paper to witness)?

A. That is my signature, yes, sir.

Mr. Hogsett: I ask the reporter to mark that.

A. Yes, sir—what is the date of that?

Mr. Hogsett: July 9, 1920.

(Whereupon the said paper, so handed to the stenographer by counsel, was duly marked Exhibit "A" by the stenographer for identification.)

(Whereupon Mr. Hogsett hands said Exhibit "A" to Mr. Thomson.)

Mr. Hogsett: I offer in evidence Exhibit "A."

(Which said Exhibit "A" was duly received in evidence, without objection and the same is in words and figures as follows, to-wit:)

Exhibit "A."

"Suite 1314, 202 S. State Street, Chicago.

July 9, 1920.

Mr. Mont T. Prewitt, 1500 Grand Avenue, Kansas City, Mo.

My Dear Sir:

You may make an engagement for the examination of your clients, Messrs. George and Sam Wechsler, between the hours of 10 and 12 a. m. Friday, July 16th at my office Room 1314 Century Bldg., 202 S. State St., Chicago, Ill.

225 It is important for me to receive confirmation of this engagement at the earliest possible date. I am busy and out of the city a great deal. Yours very truly, (Signed) Jas. Whitney Hall."

Mr. Hogsett (reading): "Suite 1314. 202 S. State Street, Chicago. July 9, 1920. Mr. Mont T. Prewitt, 1500 Grand Avenue, Kansas City, Mo. My dear Sir: You may make an engagement for the examination of your clients, Messrs. George and Sam Wechsler, between the hours of 10 and 12 a. m. Friday, July 16th, at my office Room 1314 Century Bldg., Chicago, Ill.

It is important for me to receive confirmation of this engagement at the earliest possible date. I am busy and out of the city a great deal. Yours very truly, (Signed) Jas. Whitney Hall."

Q. What was it that was calling you out of the city, a great deal, at that time—wasn't it these railroad cases you appeared for, where you made examinations, and appeared in various railroad cases?

A. Yes, I was busy at that time on some of these cases, resulting from this work.

Q. Don't——

A. (Interrupting and continuing:) —I had some other matters just at that time, with which I was quite busy.

Q. Doctor, why is it that the road has taken you from Chicago, and brought you out all over this western country, to ex-
226 amine cases of people hurt here in Missouri, and living in Missouri—I understand the Wechslers live at Sterling, Illinois, but I am talking about why the company gets your services, brings you away from Chicago, and has you examine people living in Missouri and Oklahoma?

A. I suppose you would have to ask them. If I would conclude myself, if it weren't for modesty, I would say they wanted to know what was the matter.

Q. Don't you think there are doctors living in Oklahoma City, and Missouri, that can diagnose and give an opinion for the railroad company?

A. I think so.

Q. But, they see fit to bring you from Chicago to examine people living in Kansas City, St. Louis, Oklahoma City, and other places, and have been doing that, and made it a practice to do that for some time in the past, have they not?

A. I don't know whether they made it a practice or not. They have called me, as I stated before.

Q. How many people have you examined, people living in this western country, for a distance—living four or five hundred miles out of Chicago for the Great Western, the Chicago Great Western?

A. I couldn't give you the number, but the only people I have examined here, were people claiming damage from this wreck.

Q. In point of numbers?

A. In point of numbers, I can't tell you.

Q. Fifty?

A. I came to St. Joe on one occasion, and Mr. Brown, the attor-

ney there, had several people in, whose cases were up for settlement, and on that first trip, I think I examined some four or five on the one trip. Since then I have made probably three or
227 four trips, on the occasion of which trips I have examined one, sometimes two; I couldn't give you the number.

Q. All right, if you can't answer it, that would have been an answer in a few words, in this case: At least, the company sees fit to bring you out, taking you away from your practice in Chicago, and bringing you out to distant points, to examine only one case?

A. They have done that—both this road and other roads.

Q. And, you are unable to say how many roads employ you?

A. Only in a very general way.

Q. Would you care to do that?

A. I can't anything like in detail. I have been called in by the New York Central lines, and the Illinois Central lines, Milwaukee & St. Paul, Lake Erie & Western, Chicago & Erie, and in fact, most of the roads that come into Chicago. Occasionally they have called on me to examine a case.

Q. Ultimately, the fact of the matter is, your time is very largely taken up with this railroad work?

A. That isn't true, although some of it is.

Q. You like the work?

A. Very much.

Q. Now, Doctor, what does it pay you to come out from Chicago, like this, to attend a case?

A. What does what pay me?

Q. What do you charge, your time and expert services, for coming out?

A. You mean what I charge for my time?

Q. No, what do you charge for your expert testimony?

A. I couldn't tell you. I don't know how long I will be kept here.

228 Q. Suppose thirty minutes?

A. That will make it cheaper.

Q. You came when this case opened?

A. I left Chicago Sunday night, and got here Monday morning.

Q. And you were here while the jury was being empaneled, the opening statements made and the plaintiff's case being heard?

A. Yes, I was here all day yesterday.

Q. And, you were assisting the defendant, by sitting in the case, by passing notes to the claim agent, and Mr. Thomson, and his assistants, continually during the examination?

A. That isn't true at all.

Q. How many times did you do that, openly?

A. What I did, I did openly.

Q. Yes. That is how I happened to know it?

A. Yes.

Q. How many different times did you do it?

A. I made some suggestions to them.

Q. Voluntarily?

A. I was not forced.

Q. No, you did it without (being forced); you were actively assisting the defendant in this case, as their medical director, in framing the questions?

A. I don't know as I will admit that at all.

Q. Will you admit it?

A. No, I won't admit it.

Q. Will you give us some idea, how much you are going to charge the defendant, for the services in this case, assuming you get back to Chicago in the morning?

A. You mean an idea of the exact amount?

Q. The exact amount I asked you?

A. I shall charge them one hundred dollars a day, and expenses.

229 Q. And, that will be two hundred dollars for your services, for your services in this matter, assuming you get back tonight?

A. That will be two hundred dollars for my time, assuming I get back to Chicago.

Q. One hundred dollars a day?

A. Yes, sir.

Q. Now, how much did you charge them for the examination in Chicago?

A. I don't remember.

Q. About how much?

A. Oh, I probably charged them fifteen dollars apiece—about thirty dollars, I don't remember.

Q. Now, this young man came up there to your office, in Chicago, did he—he came to your office—you didn't go out to his house?

A. No, no; he came to my office.

Q. What was the date of the examination?

A. I don't remember. I thought yesterday it was later, but I had some other cases in mind. My recollection has been refreshed since the letter you showed me, which calls attention to the time. I thought it was in November, but it was another matter; probably was in July, I don't remember.

Q. It is not important. If it was in July, it was seven months and a half, I believe, after this injury had occurred?

A. Well, that is purely a question of calculation.

Q. Of mathematics?

A. Yes.

Q. The accident in January, and the examination in July, July sixteenth. Now, by that time, of course, Doctor, you would expect the objective evidence of injury to have disappeared, in seven

230 and one-half months, cuts and abrasions, and bruises, injuries of that kind, would naturally have disappeared long before that, would they not?

A. Bruises would all disappear; the cuts should disappear, but if they are of any consequence, they would leave scars, that could be detected at any time in the man's life.

Q. You did find a scar on his buttocks, you said?

A. I did, yes, sir.

Q. What was the plaintiff's attitude, during this examination?
A. You mean as to disposition?
Q. Yes, sir; as to telling you the history of his case, and all about it?
A. There was nothing unusual; there was no obstruction, and he seemed to respond.
Q. And, by "respond," you mean he answered your questions frankly and candidly?
A. I thought so.
Q. He didn't give you any impression he was trying to pull over anything on you, or trying to conceal anything, but he answered the questions frankly and candidly—isn't that so?
A. So far as I know; yes, sir.
Q. The impression you got of the young man was that he was honest in his statements to you, isn't that true?
A. No, that isn't true.
Q. Did you ever find a case of vertigo, in a railroad case, where there was any objective symptoms, in your life?
A. I didn't quite get that—what is that?

Mr. Hogsett: Read it?
(Whereupon the question was duly read by the reporter.)

A. Well, I couldn't, I couldn't answer that question, and be fair with you or myself either. There is no more reason why a
231 man with objective symptoms, might not have vertigo, than a man who has no objective symptoms might not have vertigo, but there are no objective symptoms of the vertigo.

Mr. Hogsett: That is the point exactly.

A. I thought it was.
Q. If a man is honest, if he does have these attacks, and is honest in his statements about it, you might examine him repeatedly, and not find any objective symptoms, that is true?
A. I found objective symptoms in this man, that would account for it.
Q. What was it?
A. I found competent cause for it.
Q. Yes, what was it?
A. Infection of the throat is the most common cause of vertigo.
Q. Nine out of ten have some infection of the tonsils?
A. Yes, I think so. If that infection remains in the throat, it may never cause vertigo.
Q. Yes.
A. (Continuing:) —and if it doesn't remain in the throat, and an internal ear trouble develops, they may have vertigo.
Q. Yes.
A. (Continuing:) —that is one of the common causes for it.
Q. Yes.
A. (Continuing:) —now, as I state, I found this wax in the ear, which is a very common cause of vertigo.

Q. Yes. Doctor, wax is a secretion nature puts in the ears, to keep foreign particles from getting in there?

A. We agree on that.

Q. Are you trying to say there is anything in wax, that
232 would cause vertigo?

A. Yes, absolutely, wax in the ear is a very common cause, not only of dizziness, not only of vertigo, but ofttimes amounting almost to——

Q. (Interrupting.) You say there was no dizziness?

A. No, there was no dizziness.

Q. I understood you to say the wax was the cause of the dizziness?

A. No, not at all.

Q. You are using the wax only for the purpose of accounting for the dizziness, but you won't say it was the cause of dizziness?

A. The implication is absolutely unfair——

Q. (Interrupting.) Is that the way you are testifying?

A. In some cases it might cause dizziness in a man, and in other cases it seems to have no effect at all, that is what I mean.

Q. Now Doctor, have you ever examined a prize fighter, after an accident?

A. I don't know that I ever examined a professional prize fighter for blood in the urine, if that is what you are leading up to. I have examined prize fighters.

Q. Now, you made the statement that nearly every prize fighter, after a bout, has blood in the urine. Why did you do that, if you have never examined them?

A. Because of the fact that is the history of men who are examined following blows to the back.

Q. Why did you bring out prize fighters?

A. Simply for an illustration, is all—for no other purpose.

Q. Have you ever seen a case of vertigo, attacks of dizziness, following an injury or blow on the head?

A. Why, many of them.

233 Q. Many of them?

A. Yes.

Q. Is it a more or less common result?

A. It is almost a constant result, immediately following the head injury.

Q. How many have you seen, for a long period?

A. None, unless there were some other symptoms.

Q. Have you ever seen any symptoms of dizziness, recurrent, following a blow on the head?

A. Never without other symptoms.

Q. What is Petit Mal.

Mr. Thomson: Now, if Your Honor please, that is entirely beyond the issues of the case, and pleadings of the case, and I object to it.

The Court: Sustained.

Mr. Hogsett: I will get at that in another way:

Q. Do you find conditions, following a trauma, or injury, of transient or partial unconsciousness, accompanied by a feeling of faintness and vertigo—do you find such cases?
A. What is that?

Mr. Hogsett: Read the question.
(Whereupon the question was duly read by the reporter.)

Q. (Continuing:) —recurrent in frequency?
A. Not as the result of an injury. You may find them after an injury.
Q. Don't you find cases, following an injury, not only immediately, but continuously?
A. No, sir, not——
Q. (Interrupting and continuing:) —never heard of that?
A. Not as a result of an injury.
Q. You never heard of that?
A. I have heard it in court.
Q. Do you know Osler on Medicine?
A. Yes, sir.
Q. A well recognized work on the subject, isn't it?
A. Yes, sir, I knew Doctor Osler very well.
Q. Does he, in his books on this subject, or his work, the "Practice of Medicine," attribute Petit Mal to injury?
A. I don't know.
Q. You don't know?
A. No.

Mr. Thomson: Wait just a moment. If Your Honor please, these objections shouldn't be necessary, the court has passed on this two or three times.
Mr. Hogsett: Now, wait a minute.
Mr. Thomson (interrupting): Wait until I get through, now. Now, this matter must be clear to Mr. Hogsett. The court has ruled at length, in a discussion of it yesterday, and he has passed upon it today, and I think it is unfair to engage in that, after the court has passed on it two or three times.
Mr. Hogsett: The court hasn't passed upon this phase of it at all. The court indicated that the evidence as to Petit Mal came within the issues, but we consented that the designation of the trouble as "Petit Mal," might be withdrawn and that was done. Now, this is in another slant entirely in the case. This witness has testified he never heard of periods of unconsciousness, transient in character, accompanied by faintness and vertigo following continuously after an injury.
A. I didn't say anything of the kind.
Q. You didn't say anything of the kind?
A. No, I said "Not as a result of an injury."
Q. Well, that is what I meant when I said "Following injury,"—you said "not as the result of an injury," and I said "following an injury," and I mean the same thing: Now, as he said that, if I

can controvert that on cross examination from an authority that he said is an authority, I have a right to do it.

Mr. Thomson: Now, if Your Honor please, I want a direction from the court to the jury that the court did rule and hold that any such matter was incompetent in the case.

The Court: I understand, Mr. Hogsett, you have agreed to withdraw the term "Petit Mal" from the allegations?

Mr. Hogsett: That is correct. All right, I will not take any chance of any errors creeping into the record, I will abandon it.

The Court: I have instructed the jury to that effect, that that term was withdrawn.

Mr. Thomson: If Mr. Hogsett wants to offer in evidence any authority there, the court can determine whether it is competent or not. I don't think it is proper, proper form of cross examination of this witness, and I object to the handing of books, and one thing and another, that Mr. Hogsett has. If he has something he wants to offer in evidence, that is an entirely different question, but I think it is not the proper form of cross examination of this witness, and I object to it.

The Court: Overruled.

236 To which action and ruling of the court, the defendant, by its counsel, at the time, then and there duly excepted, and still excepts.

Mr. Hogsett: Doctor, men don't lose weight, without some cause, do they?

A. No, I think perhaps there is a cause for everything.

Q. There is always a cause for that: You take a man, we will say, that weighs one hundred and sixty-six to one hundred *to* sixty-eight pounds, that is in a railroad wreck, a car that he is in is overturned, and rolls down an embankment about twenty feet, and out into the edge of the right of way, possibly thirty-five or forty feet from the track, and he is thrown all over that car, as it is rolling down the embankment; following that, he suffers a loss in weight there within the first few months—I don't remember what his evidence is—after the injury, of as much as twenty-six pounds loss in weight, and that, at the present time, and thereafter—a year and two months after the injury you weighed, and you find that he is now nineteen pounds under his former weight. Would you, as a practical matter, attribute that to the injury, and the effect received in that wreck, or not?

A. Well, I couldn't on that statement of yours, form any conclusions at all.

Q. You couldn't?

A. The railroad wreck might have killed him, but it didn't.

Q. Yes.

A. (Continuing:) —now, it might have made some cuts, that were followed by an infection, that would greatly reduce his weight, and general condition.

237 Q. Nothing of that kind is claimed. We will eliminate that.

A. In the question of his being i[n] the coach, and getting some superficial lacerations as the resu[lt] of that, that he changed his habits, laid around the house, took no exercise, was not eating as heavily as before, the general change in environment, that might account for that, and if he did the same thing, without the wreck, he may have lost the same weight.

Q. Might the wreck have anything to do with it?

A. It would have caused him to lie around, and lay up a few days on account of his muscular soreness.

Q. Don't dodge that issue: Might the shock, received from the wreck, reasonably result in twenty-six pounds loss in weight—would that have resulted in that?

Mr. Thomson: I submit the witness has not dodged.

Mr. Hogsett: Well, I want him to answer that question, he is arguing with me.

Mr. Thomson: Mr. Hogsett, that is not a proper statement.

Mr. Hogsett: He is arguing with me, and if he will answer my question, I will get through in five minutes.

The Court: I think he has answered the question.

Mr. Hogsett: All right, that is all, Doctor.

Mr. Thomson: That is all.

(Witness excused.)

Mr. Thomson: I would like to cross examine the plaintiff a little further.

238 GEORGE WECHSLER, the plaintiff in said cause, of lawful age, having been heretofore duly produced, sworn and examined on his own behalf, resumed the stand, and upon his oath testified as follows:

Recross-examination by Mr. Thomson:

Q. Mr. Wechsler, your petition in this case was filed on January 29, 1920, was it not?

A. Somewhere around there I don't remember the date.

Q. You look at the file marks on the petition (handing paper to witness).

Mr. Hogsett: What ever that shows, we admit, of course.

The Witness: A. Yes, sir.

Mr. Thomson: I offer the filing mark on the back of the petition in evidence, to show the date filed:

(Which said filing mark is in words and figures as follows, to-wit:)

"Filed January 29, 1920. W. H. Harper, Clerk. By J. B. Stacy, Deputy."

Mr. Thomson:

Q. I notice, Mr. Wechsler, in the petition, on the second page, there is added after these words "He was bruised and injured upon his head, body and limbs. His left side, left hip and limb, left thigh, and right ankle, foot and limb," and following "limb" and after that is added "and his kidneys,'" is inserted with pen. Can you tell me when that was done?

Mr. Hogsett: The records will show.

Mr. Thomson:

Q. Can you tell me, Mr. Wechsler?

Mr. Hogsett: No, but they will show down in the clerk's
239 office. I gave you notice of it, and you probably have that, the letter.

Mr. Thomson: I can probably get it. I just want to show the facts.

Mr. Hogsett: That is all right, I am perfectly willing to admit whatever that letter shows will be the date.

Mr. Thomson (referring to letter): July 31, 1920.

Mr. Hogsett: That is approximately it. I think it was done that day, or the next day.

Mr. Thomson (handing paper to Mr. Hogsett): That is your letter?

Mr. Hogsett: Yes, yes.

Mr. Thomson: Please mark this Exhibit "7."

(Whereupon the said letter, so handed to reporter, by counsel, was duly marked Exhibit "7" by the reporter for identification.)

Mr. Thomson: I offer in evidence Exhibit "7."

Mr. Hogsett: No objection.

(Which said Exhibit "7" is in words and figures as follows, to-wit:)

Exhibit "7."

Hogsett & Boyle, Lawyers, 1012 Grand Avenue Temple, Kansas City, Mo.

William S. Hogsett, Murat Boyle, Chester L. Smith, L. A. Nunnink, Carl A. Neibling.

July 31, 1920.

40 In re Sam Wechsler vs. Chicago Great Western.

In re George Wechsler vs. Chicago Great Western.

Warner, Dean, Langworthy, Thomson & Williams, Scarritt Building, City.

GENTLEMEN: We have by leave of court amended the petitions n these cases by interlineation as follows:

In the George Wechsler petition we have inserted after the word imb in the thirteenth line of the second page, the words: 'and his idneys,' and have inserted after the word 'inflamed' in the 18th ine of that page, the words: 'and he has suffered and will suffer ith deafness'; and we have inserted after the third word in the wenty-sixth line of that page the words: 'he has lost weight and trength and.'

In the Samuel Wechsler petition we have interlined after the word has' in the 29th line of the second page of the petition the words: lost weight and strength and he has.'

We assume that you will require no other or more formal notice f these amendments than this latter. If we are in error, kindly dvise us. Yours truly, (Signed) Hogsett & Boyle. WSH:AB."

Mr. Thomson (reading): "Hogsett & Boyle, Lawyers, 1012 Grand venue Temple, Kansas City, Mo. William S. Hogsett, Murat oyle, Chester L. Smith, L. A. Nunnink, Carl A. Neibling, July 31, 1920. In re Sam Wechsler vs. Chicago Great Western, In 41 re George Wechsler vs. Chicago Great Western. Warner, Dean, Langworthy, Thompson & Williams, Scarritt Building, ity. Gentlemen. We have by leave of court amended the peti- ons on these cases by interlineation as follows:

In the George Wechsler petition we have inserted after the word mb in the thirteenth line of the second page, the words, 'and s kidneys,' and have inserted after the word 'inflamed' in the ghteenth line of that page, the words, 'and he has suffered and ll suffer with deafness'; and we have inserted after the third word the twenty-sixth line of that page the words: 'he has lost weight d strength and.'

In the Samuel Wechsler petition we have interlined after the rd 'has' in the 29th line of the second page of the petition the rds: 'lost weight and strength and he has.'

We assume that you will require no other or more formal notice of these amendments than this letter. If we are in error kindly advise us. Yours truly, (Signed) Hogsett & Boyle. WSH:AB."

Mr. Thomson: When Mr. Wechsler, was this amendment made to this petition?

Mr. Hogsett: Mr. Thomson, you and I can agree on it.

Mr. Thomson: Well, there was an amendment made.

Mr. Hogsett: It is agreed that the language here, interlined, with reference to the dizziness now "and he has suffered and will suffer with deafness, and with attacks of dizziness and semi-con-
242 sciousness" was added to the petition by amendment, within the last week. Now, as to the day, I don't know. I can get that.

Mr. Thomson:

Q. Mr. Wechsler, did you have any communication, or arrangement with the Rahe Automobile School, before you started from home?

A. Yes, sir.

Q. (Continuing:) —about attending there?

A. Yes, sir.

Q. Did they send you a ticket, or something, entitling you to ride from the station to their place of business?

A. Yes, sir, that was to save time.

Q. And they took you themselves, some of them, from the Rahe Automobile School, to your boarding house on Troost Avenue?

A. Yes, sir.

Mr. Thomson: That is all. Defendant rests.

Mr. Hogsett: That is all. Plaintiff rests.

Whereupon at the close of all the evidence in said cause the defendant requested the court to give the jury an instruction in the nature of a demurrer, as follows, to-wit:

Defendant's Requested Instruction No. 1.

In Circuit Court of Jackson County.

"At the close of all the evidence in the case, you are instructed that under the law and the evidence your verdict must be for the defendant" (Refused).

Which said instruction No. 1, in the nature of a demurrer to the evidence the court refused to give, to which action and rul-
243 ing of the court, the defendant, by its counsel, then and there at the time duly excepted, and still excepts.

The Court: Gentlemen of the jury, you will be excused until called. Wait in the corridor until you are called.

(Whereupon the jury retired for a short recess until the instructions are settled, and upon returning the following proceedings were duly had:)

Thereupon, the plaintiff requested the court to give the following instructions, to-wit:

Plaintiff's Instructions.

In Circuit Court of Jackson County.

"A."

"The court instructs the jury that if you believe and find from the evidence that the plaintiff was a passenger upon the train in question at the time he claims to have been injured, then having received the plaintiff upon board of such train, the due obligation of the defendant to plaintiff was to use the highest degree of care practicable among prudent, skillful and experienced men in that same kind of business, to carry him safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on defendant's part; and defendant would be responsible for all injuries resulting to plaintiff (if any) from such negligence (if any). And if you believe and find from the evidence that plaintiff was a passenger on said train, and that while he was riding on said train as a passenger said train became derailed and the coach in which plaintiff was riding overturned, and that as a direct result thereof plaintiff sustained
244 injuries, then you are instructed by the court that the presumption is that said derailment and overturning were occasioned by some negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on defendant's part, and that the injuries (if any) were occasioned by inevitable accident, or by some cause which such highest decree of care could not have avoided" (Given).

"B."

"If you find the issues in favor of the plaintiff then you should award him such sum as you may believe and find from the evidence will be a fair, just and reasonable compensation to him for the injuries in question (if any), not exceeding the sum of $15,000.00" (Given).

(And thereupon the court gave the instructions numbered "A" and "B," so asked by the plaintiff, to which ruling and action of the court, in giving said instructions numbered "A" and "B" and each of them the defendant, by its counsel, then and there at the time duly excepted and still excepts.

Thereupon, the defendant requested the court to give the jury instructions as follows, to-wit:

Thereupon, the defendant requested the instructions numbered "2" to "8," both inclusive, as follows, to-wit:

245 **Defendant's Instructions.**

In Circuit Court of Jackson County.

You are instructed that under no circumstances can your verdict be in favor of plaintiff in excess of three thousand dollars ($3,000.00) dollars. (Refused.)

Instruction No. 3.

"You are instructed that the law places the burden upon the plaintiff to make out his case of his injuries by a preponderance, that is to say, the greater weight of the credible evidence in the case, and this burden remains with the plaintiff throughout the trial. In this case if you find the plaintiff has failed to make out his case in any particular as above defined, then in such particular your finding should be in favor of the defendant, and you are so instructed." (Given.)

Instruction No. 4.

"You are further instructed that the jury are the exclusive judges of the credibility of witnesses and the weight and value to be given to their evidence and in determining the weight and value to be given to the testimony of the respective witnesses the jury may take into consideration the interest, if any, that such witnesses have in the result of this suit; their relationship, if any, to the parties to the suit, their manner of testifying and their conduct while delivering their evidence, and if the jury believe that any witness has wilfully sworn falsely to any material fact in issue in this case, then they may reject and disregard the whole or any part of the testimony of said witness, if any." (Given.)

246 *Instruction No.* "5."

"You are instructed that the United States Government took over the control and operation of the Chicago Great Western Railroad solely as an emergency measure to increase the efficiency of the transportation facilities in this country in its participation in and victory in the World War. You are therefore instructed in this case that in determining the question of whether or not any negligence of the defendant or his servants, agents or employees, caused or contributed to the injury which plaintiff sustained, if any, you should consider the circumstances under which this railroad and the train in question were maintained and operated by the defendant." (Refused.)

Instruction No. 6.

"Even though the plaintiff, George Weschsler, was hurt without any fault upon his part, still under no circumstances can a verdict be rendered against the defendant, unless the jury find that the train left the track by reason of the negligence of the defendant's agents, servants or employees. If the train by an unavoidable casualty or accident got off the tracks and in that way caused plaintiff's injury, if any, then there was no negligence and your verdict must be for the defendant." (Given.)

Instruction No. 7.

"The defendant is not required to prove what caused the train to leave the tracks, and even if the jury cannot find from
247 the evidence the exact cause, of if such is unknown, and has not been shown, still after considering all the testimony in the case, not only that offered by defendant, but that offered by the plaintiff, you find that there was not any negligence on the part of the defendant, then defendant must have the verdict even though plaintiff was its passenger and received his injury, if any, without any fault upon his part." (Given.)

Instruction No. 8.

"Defendant was not an insurer of the safety of plaintiff, nor was he required to exercise any degree of care or foresight that was not practicable, and if you find that defendant has exercised the highest degree of practicable care under all of the circumstances, and that the accident happened without negligence on the part of the defendant, its agent, servants or employees, then the plaintiff could not recover under any circumstances, then your verdict must be for the defendant." (Given.)

Of which said instructions, numbered "2" to "8," both inclusive, so requested by defendant, as aforesaid, the court gave those numbered "3," "4," "6," "7" and "8"; and refused to give instructions numbered "2," and "5"; and to which action and ruling of the court, in refusing to give said instructions numbered "2" and "5," and each of them the defendant, by its counsel, then and there at the time duly excepted, and still excepts.

Thereupon, the court, of its own motion, gave the jury the following instructions, to-wit:

248 **Instructions of the Court.**

In Circuit Court of Jackson County.

"You are instructed that nine or more jurors may render a verdict for either party in this case. If all of you agree upon a ver-

dict your foreman alone will sign it but if your verdict is rendered by nine, or more, and less than twelve jurors, your verdict must be signed by all of the jurors who agree to it.

Forms of Verdict.

If all of you agree upon a verdict for the plaintiff, it may be in the following form:

'We, the jury, find the issues for the plaintiff, and do assess his damages at — dollars (stating the amount). —— ——, Foreman.'

If a less number than twelve jurors render a verdict for the plaintiff it may be in the following form:

'We, the undersigned jurors, find the issues for the plaintiff, and do assess his damages at — dollars' (stating the amount).

If all of you agree upon a verdict for the defendant, it may be in the following form: 'We, the jury, find the issues for the defendant. —— ——, Foreman.'

"If a less number than twelve jurors render a verdict for the defendant, it may be in the following form: 'We, the undersigned jurors, find the issues for the defendant.'

These forms are given for guidance only and your verdict should be written on a separate paper, and not on one of these instructions. (Given."

249 To which action and ruling of the court, in giving said instruction, of its own motion, the defendant, then and there, by its counsel, at the time duly excepted, and still excepts. Thereupon, at the conclusion of the arguments of counsel, the case was given to the jury, and on the — day of March, 1921, the jury returned a verdict in favor of plaintiff, upon which judgment was entered accordingly; which said verdict is in words and figures following, to-wit:

Verdict.

In Circuit Court of Jackson County.

"We, the undersigned jurors, find the issues for the plaintiff and do assess his damages at (Five Thousand Dollars) $5,000.00. Wornall Rowland. Harry C. Thomson. Fred C. Franzmathes. William L. Hunter. E. Paul Ganse. Jos. W. Barr. F. E. Kreek. Floyd R. Sharp. C. E. Felix. Alexander Morrison (Foreman)."

And afterwards, and on the forty-fourth day of the January Term, 1921, of this court, the same being Thursday, March 3, 1921, and within four days after the rendition of the judgment herein, comes the defendant, and files a motion for a new trial in

this case; and thereafter, on to-wit, Thursday, March 3, 1921, comes defendant, and files motion in arrest of judgment in said
250 cause, which said motion for a new trial, and motion in arrest of judgment, are respectively, in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1921.

[Title omitted.]

Motion for New Trial.

[Filed Mar. 3, 1921.]

Comes now the defendant and moves the court to grant the defendant a new trial herein for the following reasons, to-wit:

1. Because the verdict is against the law.
2. Because the verdict is against the evidence.
3. Because the verdict is against the law and the evidence.
4. Because the verdict is against the greater weight of the credible evidence.
5. Because the court erred in admitting incompetent, irrelevant and immaterial matter offered by the plaintiff and over the objections of the defendant.
6. Because the court erred in excluding competent, relevant and material matter offered by the defendant and excluded by the court.
7. Because the court erred in refusing the application of the defendant to limit the possible amount recovered by plaintiff to $3,000.00.
8. Because the court erred in refusing defendant's motion to require plaintiff to reduce the amount sued for to $3,000.00.
251 9. Because the court erred in giving the instructions and each of them given on behalf of the plaintiff over the objections of the defendant.
10. Because the court erred in giving instruction "A" requested by plaintiff and given by the court over the objections of the defendant.
11. Because the court erred in giving instruction "B" requested by the plaintiff and given by the court over the objection of the defendant.
12. Because the court erred in refusing to give each and all of the instructions requested by the defendant and refused by the court.
13. Because the court erred in refusing to give instruction No. 1 requested by the defendant and refused by the court.
14. Because the court erred in refusing to give instruction No. 2 requested by the defendant and refused by the court.
15. Because the court erred in refusing to give instruction No. 5 requested by the defendant and refused by the court.

16. Because the plaintiff biased and prejudiced the minds of the jurors by his questions relating to petit mal and forms of epilepsy, and particularly after the court had ruled repeatedly that such testimony was incompetent, and all of such questions were beyond the issues in this case and entirely outside and beyond all the allegations of plaintiff's petition.

17. Because the plaintiff created bias and prejudice against the defendant on the part of the jury by repeatedly asking ques-
252 tions without the issues in this case, and thereby suggesting or intimating to the jury that the plaintiff, as the result of the injuries which he stated he received at the time in question, was suffering from petit mal or some form of epilepsy, and the poison thus put in the minds of the jury was not removed by ruling of the court, and each and all of such questions were improper and not within any pleading or issues in this case.

18. The court erred in refusing the written application of the defendant to require plaintiff to submit to a physical examination by an ear specialist to be named by the court.

19. Because the verdict is excessive.

20. Because the verdict is so excessive as to shock the sense of justice.

21. Because the verdict of the jury was the result of bias and prejudice upon the part of the jury against the defendant.

Wherefore, defendant prays judgment of the court. (Signed) Warner, Dean, Langworthy, Thomson & Williams, Attorneys for Defendant."

The above motion for new trial is endorsed on the back with the number, style of cause, character of the document, and the following:

"Filed Div. 6, Mar. 3, 1921, W. H. Harper, Clerk, By A. A. Ridge."

253 In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1921.

[Title omitted.]

Motion in Arrest of Judgment.

[Filed Mar. 3, 1921.]

Comes now the defendant and moves the court to arrest the judgment herein for the following reasons:

1. Because the petition does not state facts sufficient to constitute a cause of action against the defendant.

2. Because upon the face of the whole record, the verdict is erroneous.

3. Because upon the face of the whole record, the verdict should have been for the defendant.

Wherefore, the defendant prays judgment of the court. (Signed) Warner, Dean, Langworthy, Thomson & Williams, Attorneys for Defendant."

The above motion in arrest of judgment is endorsed on the back, with the number, style of cause, character of document, and the following:

"Filed Div. 6, Mar. 3, 1921, W. H. Harper, Clerk, By A. A. Ridge."

And afterwards, on the eighteenth day of the March Term, 1921, of said court, the same being Saturday, April 2, 1921, the defendant's motion for a new trial of this cause is by the court overruled.

254 To which action and ruling of the court, the defendant, by its counsel, then and there at the time duly excepted and still excepts.

And thereafter, on the same day, to-wit, the second day of April, 1921, defendant's motion in arrest of judgment is by the court overruled.

To which action and ruling of the court, the defendant, by its counsel, then and there at the time duly excepted and still excepts.

Order Substituting Parties Defendant.

And afterwards, on to-wit, the forty-fifth day of the March Term, 1921, the same being Wednesday, May 4, 1921, come the parties, by attorneys, and it appears to the court that since the date of the judgment herein, John Barton Payne has resigned as Director General of Railroads, and Agent designated by the president, under the Transportation Act, 1920, and that the president has by proclamation appointed James C. Davis Director General of Railroads, and Agent, as aforsaid, who now appears herein by his attorneys, and enters his appearance herein, and all of said parties do now, in open court agree that he shall be substituted herein as defendant.

It is therefore by the court ordered that James C. Davis, Director General of Railroads, and Agent designated by the president, under Transportation Act, 1920, be, and he is hereby substituted as defendant in this cause, and in the judgment rendered herein.

And afterwards, on to-wit, the forty-seventh day of the March Term, 1921, the same being Friday, May 6, 1921, comes

255 defendant, and by attorney presents and files application and affidavit for appeal, from the judgment of this court in this cause, which application and affidavit for appeal is in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

[Title omitted.]

Application and Affidavit for Appeal on Behalf of Defendant.

[Filed May 6, 1921.]

Now comes the defendant, James C. Davis, Director General of Railroads and Agent designated by the president under Transportation Act, 1920, and respectfully prays the court that he be granted an appeal from the final judgment of this court to the Kansas City Court of Appeals. (Signed) Warner, Dean, Langworthy, Thomson, & Williams, Attorneys for Defendant.

STATE OF MISSOURI,
County of Jackson, ss:

Roy B. Thomson, of lawful age, being duly sworn, states that he is agent and attorney for James C. Davis, Director General of Railroads and Agent designated by the president under Transportation Act, 1920, defendant and appellant in the above entitled cause, and as such is authorized to and does make this affidavit for and on behalf of said defendant.

256 Affiant further states that the appeal taken on behalf of said defendant is not made for vexation or delay, but because the affiant believes that said appellant, James C. Davis, Director General of Railroads and Agent designated by the president under Transportation Act, 1920, is aggrieved by the judgment and decision of this court. (Signed) Roy B. Thomson.

Subscribed and sworn to before me this 6th day of May, 1921. My commission expires April 22, 1923. (Signed) Evelyn D. Ryle, Notary Public within and for said County and State." (L. S.)

The above application and affidavit for appeal on behalf of defendant, is endorsed on the back with the number, style of cause, character of document, and the following:

"Filed Div. 6, May 6, 1921, W. H. Harper, Clerk, By Tena Gershon."

Order Allowing Appeal.

In Circuit Court of Jackson County.

And thereupon, the said application and affidavit for appeal on behalf of defendant, is by the court sustained, and appeal allowed to the Kansas City Court of Appeals, and defendant is given leave to file its bill of exceptions herein, on or before the third day of the September Term, 1921.

Order Settling Bill of Exceptions.

In Circuit Court of Jackson County.

And now comes the defendant, at the May Term, 1921, of said court, and presents the foregoing, its bill of exceptions, to the Honorable Samuel A. Dew, judge of Division Number Six, of said Circuit Court of Jackson County, Missouri, at Kansas City, and
257 prays him to allow and sign the same, as its true bill of exceptions, to the acts and rulings of the court hereinbefore recited.

Now, therefore, the undersigned, judge of Division Number Six, of the Circuit Court of Jackson County, Missouri, at Kansas City, before whom said cause was pending, and the said proceedings were had, being fully advised in the premises, does find the foregoing to be a true bill of exceptions, on the part of the defendant, and doth sign, and in open court order that the same be filed, and be a part of the record in this cause, and the same is accordingly done on this day.

Given under my hand, at Kansas City, Missouri, this 12th day of September, 1921. Samuel A. Dew, Judge of Division Number Six of the Circuit Court of Jackson County, Missouri. Approved: Hogsett & Boyle, Attorneys for Plaintiff.

Filed Sep. 12, 1921. W. H. Harper, Clerk, By A. A. Ridge, D. C.

In due time the defendant filed in this court certified copy of the judgment and order allowing appeal by said Circuit Court, and this case is now pending in this court on appeal.

The foregoing is a true and correct Abstract of the Record in said cause on behalf of the appellant. Warner, Dean, Langworthy, Thomson & Williams, Attorneys for Appellant.

258

Index.

	Page.
Petition for Damages	2
Petition for Removal to the United States District Court	5
Bond for Removal	8
Notice of Filing of Petition and Bond for Removal	10
Bond and Petition for Removal Withdrawn	11
Plaintiff's Amended Petition	11
Defendant Filed Answer	11
Reply	11
Petition Amended by Interlineation	11
Petition Amended by Interlineation and Erasure	11
Motion to Strike Out Amendment to Petition	12
Motion Overruled	13
Answer to Plaintiff's First Amended Petition	13
Amended Reply	16
Petition with Amendments	17

Page.

Motion for Appointment of Physician 21
Motion Overruled 22
Verdict 22
Judgment 23
Motions for New Trial and in Arrest Filed and Overruled 24
Filing and Allowing Bill of Exceptions 26
Appeal 26
Exhibits 1 to 6, Photographs 34
Bill of Exceptions ..... 27 to 257
258a Exhibit A, Letter, Hall to Prewitt, July 9, 1920 224
Exhibit 7, Letter, Hogsett & Boyle to Warner-Dean 239

Plaintiff's Evidence—

Erganbright, Mrs. Margaret—
Direct Examination 28
Cross Examination 36

Brock, Mrs. Carrie—

Direct Examination 37
Cross Examination 40
Re-Direct Examination 41
Re-Cross Examination 41

Wechsler, George—

Direct Examination 41
Cross Examination 56
Re-Direct Examination 70
Re-Cross Examination 72
Re-Cross Examination (recalled) 238

Bleil, Dr. A. W.—

Direct Examination 75
Cross Examination 84

Lowry, Mrs. Catherine, Deposition of—

Direct Examination 97
Cross Examination 109
Re-Direct Examination 117
Re-Cross Examination 119
Re-Direct Examination 124
Re-Cross Examination 125
Re-Direct Examination 126
Re-Cross Examination 127

Neal, Dr. J. Park—

Direct Examination 129
Cross Examination 143

Page.

258b Thomson, Roy B.—
Direct Examination 149

Millhouse, Frank—
Direct Examination 152
Cross Examination 156

Miller, Christ F.—
Direct Examination 157
Cross Examination 161
Re-Direct Examination 165

Plaintiff Rested 166

Defendant's Evidence—

Ritchey, Thomas—
Direct Examination 166
Cross Examination 170
Re-Direct Examination 175
Re-Cross Examination 175

Thompson, Miss Marie—
Re-Direct Examination 176

Cash, Miss Mae L.—
Direct Examination 178

Leigh, H. P.—
Direct Examination 180
Cross Examination 182
Re-Direct Examination 183
Re-Cross Examination 184
Re-Direct Examination 185

Lawson, Miss Marie—
Direct Examination 186

Leiter, Miss Cecelia—
Direct Examination 188

258c Miller, Dr. B. H.—
Direct Examination 193
Cross Examination 195
Re-Direct Examination 197
Recalled 202

Myers, Dr. Walter C.—

Direct Examination 19

Hall, Dr. James Whitney—

Direct Examination 20
Cross Examination 22

Evidence Closed 24
Demurrer Filed and Overruled 24
Instructions 24
Verdict 24
Motion for New Trial 25
Motion in Arrest of Judgment 25
Motions Overruled 25
Application and Affidavit for Appeal 25
Appeal Allowed 25
Filing and Allowing Bill of Exceptions 25

259 *Record of All Proceedings in the Kansas City Court of Appeals, Including Judgment of said Court and Opinion of said Court Thereon:*

STATE OF MISSOURI, *set:*

Be it remembered, that heretofore, to-wit, on the first day of July, A. D. 1921, there was filed in the office of the clerk of the Kansas City Court of Appeals, a transcript of Appeal, wherein George Wechsler was respondent and John Barton Payne, director general of railroads and agent, was appellant, in words and figures as follows, to-wit:

"Be it remembered that on the 41st day of the regular January term, 1921, of the Circuit Court of Jackson County, Missouri, at Kansas City the same being the 28th day of February, 1921, the following proceedings were had and made of record before Hon. Samuel A. Dew, Judge of Division No. 6 in the cause entitled:

[Title omitted.]

Judgment.

Now on this day comes plaintiff in person and by attorney and defendant appears by attorney and to try the issues herein joined come the following jury, to-wit: William Hunter, Bernis Richardson, Floyd R. Sharp, Rowland Wornall, Paul E. Gause, Alexander Morrison, Chas. E. Felix, Harry O. Thompson, F. E. Kreek, Fred Fransmathes, Jas. W. Barr, Richard W. Thomas, twelve good and lawful men from the body of the county who were duly impaneled, tried and sworn; and the hour set for adjournment having
260 arrived the said jury is by the court allowed to separate under the usual charge until tomorrow morning at 9.30 o'clock.

On the 42nd day of the regular January Term, 1921, the same being the 1st day of March, 1921, the following further proceedings were had and made of record, to-wit:

[Title omitted.]

Now, on this day comes again the plaintiff in person and by attorney and defendant appears by attorney and come also the jury herein and the said jury after hearing the evidence and the reading of the instructions by the court and after hearing the arguments of counsel for the respective parties retires to consider the same and after due deliberation return into court with the following verdict, to-wit:

'We, the undersigned jurors find the issues for the plaintiff and do assess his damages at five thousand dollars ($5,000.00). (Signed) Wornall Rowland. Harry O. Thomas. Fred C. Fransmathes. Wm. L. Hunter. E. Paul Gause. Jos. W. Barr. F. E. Kreek. Floyd R. Sharp. C. E. Felix. Alexander Morrison.' "

261 Wherefore, it is ordered and adjudged by the court that the plaintiff have and recover of and from the said defendant the said sum of five thousand dollars ($5,000) together with the costs of this cause and have therefor execution.

On the 47th day of the regular March term, 1921, the same being the 6th day of May, 1921, the following further proceedings were had and made of record, to-wit:

[Title omitted.]

Now, on this day comes defendant by attorney and presents and files his application and affidavit for an appeal from the judgment of this court in this cause, which application is by the court sustained and appeal allowed to the Kansas City Court of Appeals and defendant is given leave to file his bill of exceptions herein on or before the third day of the September Term, 1921.

Clerk's Certificate.

STATE OF MISSOURI,
County of Jackson, ss:

I, W. H. Harper, clerk of the Circuit Court, within and for the county and state aforesaid, do hereby certify that the above and foregoing is a full, true and complete copy of the judgment and order allowing appeal in the cause wherein George Wechsler is plaintiff and James C. Davis, Director General of Railroads and agent designated by the President under the Transportation Act 1920, is defendant, as the same appears of record in my office.

262 In witness whereof, I hereunto set my hand and affix the seal of said Circuit Court, at office in Kansas City, this 10th day of May, A. D. 1921. W. H. Harper, Clerk, By Teresa G. McDonald, Deputy."

And thereafter, to-wit, on December 7, 1921, the appellant fi his printed abstract of the record, statement, specification of erro Points and Authorities and Argument, copy of which is here attached.

And on the same day, respondent filed his printed brief, copy which is hereto attached.

In Kansas City Court of Appeals.

And thereafter, to-wit, on December 12th, 1921, the court entere of record the following.

GEORGE WECHSLER, Resp.,

v.

JAMES C. DAVIS, Agent, App.

Submission of Cause.

Come now the said parties, by attorneys, and submit this cause to the court on briefs.

And thereafter, to-wit, on December 27, 1921, the respondent filed supplemental brief copy of which printed brief is herewith filed.

And thereafter, to-wit, on February 20, 1922, the court entered of record its judgment in said cause, in words and figures as follows, to-wit:

In Kansas City Court of Appeals.

[Title omitted.]

Appeal from Jackson Circuit Court.

Judgment.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that
263 the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect. It is further considered and adjudged by the court that the said respondent recover against the said appellant costs and charges herein expended, and have therefor execution (Opinion filed.)

Which said opinion is in words and figures following, to-wit:

In the Kansas City Court of Appeals, October Term, 1921.

[Title omitted.]

Appeal from Jackson Circuit Court.

Opinion.

This is an action for damages for personal injuries. Plaintiff recovered a verdict and judgment in the sum of $5,000.00 and defendant has appealed.

Plaintiff was injured on January 3, 1920, while a passenger on a passenger train operated by Walker D. Hines, Director General of Railroads. Hines was defendant's predecessor operating the Chicago Great Western Railroad. The injury was caused by the train leaving the track at Wyeth, Andrew County, Missouri. Plaintiff at the time of the accrual of his cause of action and at the time of trial was a citizen and resident of the State of Illinois.

It is insisted that under General Order 18-A of the Director General of Railroads (which it seems to be agreed, since the
264 decision of the supreme court in the case of Alabama and Vicksburg Ry. Co. v. Journey, not yet officially reported, is a valid order) the court had no jurisdiction of the cause and defendant's demurrer to the evidence should have been sustained. This order provides that suits of this kind must be brought in the county or district where plaintiff resided at the time of the accrual of his cause of action or the county or district where the cause of action arose. The order is pleaded in the answer where it is alleged that plaintiff was a resident of the State of Illinois and that his cause of action did not accrue in Jackson County, Missouri, where the suit was brought.

The Circuit Court of Jackson County, Missouri, had jurisdiction of the subject matter of this suit, but under General Order 18-A had no jurisdiction over the person of defendant's predecessor Hines, unless he chose to voluntarily submit to the jurisdiction of the court. If lack of venue did not appear on the face of the petition he had the right to raise the question of venue in his answer and include it with a defense on the merits. Harrison v. Murphy, 106 Mo. App. 465, 470.) This defendant's predecessor did. However, after the pleadings were made up in this case and before a trial of the same defendant's predecessor Hines resigned as director general of railroads and John Barton Payne was appointed in his stead upon the passage of the Transportation Act (Act of February 28, 1920, Part 1, Vol. 41, U. S. Statutes at Large, p. 456). This act provided that the President should relinquish possession and control of all
265 railroads under federal control and that he should appoint a federal agent against whom suits might be brought arising under such control. The President appointed John Barton Payne federal agent under this act and he was acting as such on February 25, 1921. The record recites:

"Thereafter and on February 25th, 1921, and during the January Term, 1921, of said court, plaintiff again amended his petition by interlineation, and John Barton Payne, director general of railroads and agent designated by the President under Transportation Act, 1920, was substituted by agreement as successor of said Walker D. Hines, and said substituted *defendant entered his appearance* in *said cause* and adopted the answer theretofore filed by said Walker D. Hines, defendant, and the court made an entry of record that such proceedings were had (Italics ours.)"

This entry of appearance was made before the trial of the cause. There is nothing upon the face of this entry to indicate that the appearance of John Barton Payne was not a general one. It is in no sense special or conditional although the entry states that Payne adopted the answer theretofore filed by Hines and the answer contains a plea to the jurisdiction setting up the provisions of General Order 18-A. However, it will be noted that the entry of appearance was not conditioned upon defendant's being allowed to adopt Hines' answer and Payne could not enter his general appearance and thereafter attempt to withdraw it by adopting the answer theretofore filed by his predecessor, which contained a plea to the jurisdiction.

Under the circumstances we must construe the entry to mean
266 that defendant entered his general appearance and thereafter adopted that part of the answer containing a plea to the merits.

We think there is no question but that John Barton Payne entered his general appearance in this case. It is conceded that he could have refused to enter his appearance and stood upon his rights and before he could have been brought into court a regular summons would have had to have been issued and served upon him in the regular way. If brought into court in this manner, he could have filed an aswer containing a plea to the jurisdiction and joined such a plea with one to the merits or he could have adopted the answer theretofore filed by his predecessor Hines, but instead of doing this he voluntarily entered his appearance. There is nothing upon the record to show that his appearance was a special one. The rule is that in order for one's appearance to be special the order, plea or motion must expressly state that the appearance is only for the purpose of excepting to the jurisdiction, or, at least, the order, plea or motion on its face must appear to be a special appearance for that purpose (2 R. C. L. 322; Nicholas v. The People, 164 Ill. 502, 503, 504; Reed v. Chilson, 142 N. Y. 152, 155.).

It is stated in 4 C. J. p. 1318, par 5—

"A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of court for all other purposes. In other words, he must limit his appearance to that particular question or he will be held to have appeared generally and to have waived the objection."

267 (See also Thomasson v. Ins. Co., 114 Mo. App. 109, 115; Harrison v. Murphy, supra.)

The reason why the federal agent should desire to enter his general appearance to the cause is quite apparent, for under the provision of Section 206 (*a*) of the Transportation Act if the plea to the jurisdiction filed by his predecessor was good and as a result thereof the suit would have been dismissed for want of venue in the Circuit Court, plaintiff could have immediately refiled the same suit in the same court, and, no doubt, it was apparent to the federal agent that this would have been a useless procedure and contrary to the spirit of Sec. 202 of the Act. This section provides that the President should wind up all business growing out of federal control as soon as practicable, so no doubt the federal agent instead of requiring plaintiff to bring a new suit elected to proceed with the one already filed as being the proper course under the circumstances. The highly technical character of the contention now being made by the defendant appears when it is realized that should we sustain defendant's contention that there was no venue in the circuit court of Jackson County, Missouri, plaintiff could immediately refile the same suit in the same court and thereafter the cause could be tried in the same manner that it has already been.

After the case was tried and judgment entered and after defendant's motion for a new trial had been overruled, John Barton Payne having resigned, James C. Davis, the present defendant, was appointed federal agent in his stead and the record shows as follows:

268 "Now on this 4th day of May, 1921, came * * * said James C. Davis, Director General of Railroads and Agent, as aforesaid, by his attorneys and enters *his appearance herein* and all of said parties do now in open court agree that he shall be substituted herein as defendant" (Italics ours).

Thereafter said Davis appealed the case here. We think there can be no question but that this was an entry of general appearance of the present defendant in this suit (Brown v. Ins. Co., 228 S. W. 883).

Plaintiff insists that the petition shows on its face that plaintiff resided in the state of Illinois and that the derailment happened in Andrew County, Missouri, and that if defendant is correct in his contention as to venue or the lack of it in the Circuit Court of Jackson County, Missouri, it appears on the face of the petition and as defendant did not demur on the ground of a lack of venue it is waived. The petition does allege that plaintiff resided in the State of Illinois at the time of the bringing of the suit and at the time of the derailment but as to where the accident occurred it alleges only that it happened "at a point near the town of Wyeth, in the State of Missouri." The petition does not state that the occurrence was within the corporate limits of Wyeth or in fact that Wyeth in an incorporated place. Unless the court passing upon such a demurrer would take judicial notice that Wyeth is located in Andrew County, Missouri, then, of course the petition was not subject to a demurrer on the grounds suggested. There is great conflict of opinion as to

269 whether the courts will take judicial notice of small towns n
incorporated by public law (See 15 R. C. L. pp. 1083, 108
1085). Nor does the petition allege that the derailment occurr
within the corporate limits of the town of Wyeth. In ruling th
present point against the defendant we prefer to place our decision o
the ground that the venue was waived by defendant entering h
general appearance.

A point is made in defendant's brief under his assignments o
error, but not elaborated, that the trial court in refusing to give hi
peremptory instruction in the nature of a demurrer to the evidenc
on the ground that the suit was brought contrary to General Orde
No. 18-A, violated Section 1 of the Fourteenth Amendment to th
Constitution of the United States in that the "verdict and judgmen
* * * if enforced against the defendant would deprive the de
fendant of his property without due process of law, and deprive th
defendant of the equal protection of the laws, for the reason tha
said suit was instituted and conducted contrary to the laws of th
United States." No other reason is given in the brief as to why thi
point should be sustained. We fail to find on examination of th
record that any constitutional point was attempted to be raised in th
trial court, nothing is said about it in defendant's instruction in th
nature of a demurrer to the evidence or in any other place in th
record. We must, therefore, hold that there is no constitutional ques
tion now in the case (Lohmeyer v. St. Louis Cordage Co., 214 Mo
685; Roy v. Kansas City, 224 S. W. 132).

270 After the filing of the petition for removal, plaintiff's pe
tition having prayed judgment for $15,000.00, alleging tha
the action involved a controversy between citizens of different state
and that plaintiff was a citizen and resident of the State of Illinoi
and that defendant was a citizen and resident of the State of Ne
York with his official residence in the City of Washington, D. C
defendant's counsel told plaintiff's attorney that the United State
District Judge for the Western District of Missouri had ruled tha
cases of this kind could be removed to the federal court, whereupo
it was stipulated between the parties that plaintiff would reduce th
prayer in his petition to $3,000 damages and defendant would with
draw his petition and bond for removal. After this was done th
United States Circuit Court of Appeals ruled that cases of this kin
were not removable and thereupon plaintiff amended his petitio
again asking for $15,000 damages. It is said that defendant the
filed a motion asking that the amendment raising the amount aske
for to $15,000 be stricken out, which the court overruled. The ac
tion of the court in regard to this is assigned as error. In this con
nection it is insisted that this agreement "was a complete compro
mise, settlement and release of any liability which might have ex
isted above $3,000.00." This contention must be ruled against th
defendant. In the first place the motion which the trial court over
ruled and the exception taken, which forms the basis of this conten
tion, are not contained in the bill of exceptions and therefore ca

not be considered by us as matters of exception; and in the
271 second place the matter of compromise and settlement in order to be insisted upon must have been pleaded in the answer (Rivers v. Blom, 163 Mo. 442, 448), and that was not done.

It is next contended that the court erred in refusing the application of the defendant for a medical examination of plaintiff. The trial was begun on the last day of February and the application was made on the first day of March. Plaintiff had theretofore twice submitted his person to an examination by a physician selected by the defendant. We fail to find the motion for the appointment of a physician in the bill of exceptions but it does appear in the abstract of the record proper. Under such circumstances we can not consider the motion. However, even could we consider the motion we think that the trial court did not abuse its direction in overruling the motion. At the time plaintiff was last examined by defendant's physician the petition alleged that as a result of the accident plaintiff's "left *ear* and left side of his face and head were lacerated, bruised and inflamed, and he has suffered and will suffer with deafness and with attacks of dizziness and semi-consciousness." The motion states that the "rights of the defendant require that a physician specialized and expert in the treatment of injuries and diseases of the ear and in proper diagnosis of conditions found in the ear be permitted and authorized to make a physical examination of plaintiff." Defendant had full knowledge of plaintiff's claim in reference to injuries and diseases of the ear at the time its physician examined plain-
272 tiff. We do not think that the court abused its discretion in not allowing a third examination of plaintiff under the circumstances.

It is last insisted that the verdict is excessive. The facts in relation to plaintiff's injury show that he was a young man twenty-three years of age at the time of the wreck; that he was in the worst wrecked coach of the train, which was about three cars from the engine. He testified that the injuries he received were:

"I was cut by glass above, on the left ankle: I was also cut on the left thigh. I was struck about the left hip, and I was cut on the head, above the left ear, and a little back. * * * About an inch back."

This cut was about two inches long and about an inch back and three inches above the ear. He was rendered unconscious and came to as he was being helped out of the car, he estimated the period of his unconsciousness at five minutes. He received a blow on the back "just above the left hip." There were a number of doctors at the scene of the wreck but he did not call one because "they were busy around there." He testified that he told others about it and they said "they would see about me and tell a doctor." There were two relief trains, the first one contained ninety-eight patients. The wreck occurred in the morning and he left for St. Joseph, Missouri, about 1:30 in the afternoon on the second relief train. While he was waiting for the relief train he was "limping around there a part

of the time" and during the rest of the time "sitting around
273 the fire" on his suit case. He had supper at St. Joseph and then came to Kansas City, arriving there about 7:30 P. M.

At the time of the wreck he was on his way to Kansas City to take a course in an automobile school. When he arrived at Kansas City he went in an automobile to the automobile school and there matriculated, after being there a short time he was assigned to a boarding house where he arrived about 7:45 P. M. He told the boarding house people about the wreck and they gave him some salves to use upon his bruises and contusions. Next morning his landlady called a doctor and he was under the doctor's care for about six weeks and until he left Kansas City. The doctor called daily to see him for three or four days and then came "every other day, or probably twice a week." During the latter part of the six weeks period plaintiff called at the doctor's office three or four times. Plaintiff went downstairs to his meals the week following his arrival in Kansas City. He attended school to the end of the regular period of six weeks and received his diploma. He was unable to do any heavy work at school and stood around and watched the demonstrations. He consulted his physician the day before he left for his home in Sterling, Ill. The doctor then told him that "a doctor could not do very much for him, could not do anything." He had no doctor after he left Kansas City. He also testified that he was not financially able to call a doctor to see him at Sterling.

The evidence shows that plaintiff's cuts and contusions healed up in normal time but about three months after the wreck plain-
274 tiff began to suffer from dizzy speels, at which time he would become unconscious and "things seemed to swim, where I am, around me, and I have to sit down where I am, and it leaves me with a dull headache, a dull pain over the eyes, and back of the eyes." Plaintiff was a strong, healthy young man before the accident and never had a sensation of this kind. These spells lasted from ten to fifteen minutes and the headaches following from two or three hours to half of a day. They came on "once a week to two or three times a week." They were more frequent at the time of the trial than when they first began. The medical testimony shows that these spells are symptoms of a brain disorder, "Petite mal," which is a form of epilepsy, and that this ailment would probably get worse and that one of the characteristics of such an ailment was that it would not come on immediately after the suffering of a blow but would appear about the time plaintiff testified his trouble began.

The evidence shows that the hearing of plaintiff's left ear is impaired twenty-five per cent. Plaintiff received injuries to his left kidney. His attending physician took two samples of his urine and tested it. He found blood and white corpuscles in the first sample. The second sample, taken six weeks after the first, showed that this condition had cleared up but shreds of tissue were found in the urine indicating "extra tissue that had been scaled off (the kidney) by the congestion coming away." This condition showed that the kidney was healing but "there had been a serious injury."

This kidney condition caused plaintiff at the time of the
275 trial to get up three times in the night to urinate. Plaintiff took medicine for fourteen months after the injury trying to remedy this condition.

Plaintiff received an injury to his hip. On the morning after plaintiff was injured his hip pained him so he "could hardly stoop over to lace my shoes." "I couldn't hardy get back and forth to school, but Doctor Bleil advised me, if I could possibly do it, I should keep moving." He is able to get around but at times his hip bothers him and "I can't walk the way I should. Sometimes I can't walk without limping; in doing any heavy work, in stooping, stooping over, to lift anything I can't do it, on account of my hip. I haven't got the strength there I used to have." "It is a dead sensation, from the hip on down to the knee, as though it was partly paralyzed, or a dead feeling." The limitation of the movement of the left hip was between fifteen and twenty per cent at the time of the trial. Between the time of the injury, which occurred on the 3rd day of January, 1920, and the day of the trial, which was February 28, 1921, plaintiff lost twenty pounds in weight and was twenty pounds under his normal weight. Plaintiff also suffered a nervous shock and whenever he rides on trains he has "a nervous feeling" whenever it "bumps or jars any, why it just keeps my nerves on edge." There was medical testimony tending to show that the ills that plaintiff suffered at the time of the trial would be permanent.

Upon completion of his automobile course plaintiff went to his
home in Sterling, Illinois, but did nothing for a period of
276 about four weeks. He then opened a "small garage" for repair work and supplies. He was operating this at the time of the trial. He had no assistance but did the work himself, opening his garage at 7:30 o'clock in the morning and closing it at 8:30 in the evening. At the time of the trial he still suffered with his back. While he was able to do his work, on account of his hip he was not able to do any heavy work and while stooping over to lift anything had not the strength to lift a heavy object. We do not think that the verdict is such an amount as to warrant an interference with it by this court.

The judgment is affirmed. All concur. Ewing C. Bland.

And thereafter, to-wit, on March 2, 1922, the appellant filed his motion for rehearing, in words and figures as follows, to-wit:

In the Kansas City Court of Appeals, October Term, 1921.

[Title omitted.]

Appellant's Motion for Rehearing.

Comes now the appellant in the above entitled cause and most respectfully and earnestly prays the court to set aside its judgment and opinion herein and to grant him a rehearing in said case for each and all of the following reasons, to-wit:

I.

277 That a question decisive of the cause and duly presented by counsel in their brief has been overlooked by the court in that the decision of the court is in conflict with the laws of the United States as embodied in General Order Number 18-A of the Director-General of the Railroads as construed in the case of Alabama and Vicksburg Railway Company v. Journey, 42nd Supreme Court Reporter, 6, recently decided by the United States Supreme Court.

In that case the United States Supreme Court referring to General Order Number 18-A states that such order:

"Prohibited the institution of suits against railroads under Federal control in the court for any district other than that in which the plaintiff had resided or in which the alleged cause of action arose."

General Order Number 18-A referred to in the opinion of the Supreme Court provides that:

"All suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

This court in its opinion holds:

"The Circuit Court of Jackson County, Missouri, had jurisdiction of the subject matter of this suit but under General Order Number 18-A had no jurisdiction over the person of defendant's predecessor, Hines, unless he chose to voluntarily submit to the jurisdiction of the court."

278 This court then proceeds to hold that under the record entries as shown by the abstract of record the appellant, James C. Davis, Director-General and Agent and his predecessor, John Barton Payne, had entered their voluntary appearance, and that therefore the provisions of General Order Number 18-A did not apply.

This ruling and decision overlooks the very language itself of General Order Number 18-A and the language of the United States Supreme Court in construing General Order Number 18-A, from both of which it conclusively appears that the Circuit Court did not have jurisdiction of the subject matter of this action; that by the very terms of the order, no court had jurisdiction of the subject matter of the action excepting certain courts within certain territorial limitation prescribed in the order.

It appears from the very purpose of the making of this order, that it was the intent of the director general that there should be a territorial limit within which suits might be brought and with-

out which suits could not be brought. A reference to General Order Number 18 (aftewards amended as 18-A) shows that the purpose of this order was to save the expense and time of having railroad witnesses in attendance at the trial of suits at places far distant from the place of their usual employment. Consequently the order provides that suits against carriers while under Federal control must be brought within certain districts.

The language of the order is definite, unambiguous, and
279 we submit, not subject to any other construction than that it was intended thereby to prohibit any court from taking jurisdiction of the subject matter of the action, excepting courts within the territorial limits prescribed.

It is well settled that the jurisdiction of the subject matter cannot be waived by the voluntary appearance of the parties and that where the courts is denied jurisdiction of the subject matter, such jurisdiction cannot be conferred by consent of the parties.

Title Guaranty and Surety Company v. Drennan, (Mo. App.) 208 S. W. 474.

St. Louis v. Glasgow, 254 Mo. 262 l. c. 290.

4 Corpus Juris, 1349.

The order of the director general has the effect of taking away for the time being the transitory nature for suits for personal injuries and making them local in their nature and requiring them to be brought in certain jurisdiction only.

The case is not unlike those involving statutes which require suits relating to real estate to be brought within the counties in which the real estate lies. In such cases the Circuit Court in another county would not have jurisdiction to entertain an action notwithstanding it is a court of general jurisdiction and such jurisdiction could not be conferred by consent.

Bray v. Marshall, 66 Mo. 122.

Snitzer v. Downey, 80 Mo. 586.

Likewise the Courts of Appeal have jurisdiction of cases appealed from the Circuit Courts of certain counties only and they
280 could not acquire jurisdiction even by consent of appeals taken from Circuit Courts in counties other than those specified by statutes.

State ex rel. v. Nixon, 232 Mo. 496.

Furthermore the jurisdiction of Courts of Appeal is limited to cases involving seventy-five hundred dollars and less. Clearly the jurisdiction could not be conferred upon the Court of Appeals by consent of parties in cases involving an amount greater than that sum.

McCary v. McCary, 217 S. W. 547.

Little River Drainage District, 282 Mo. 458.

We submit therefore that this court has overlooked the explicit and definite language of General Order Number 18-A from which

it appears that the Circuit Court of Jackson County, Missouri, did not have jurisdiction of the subject matter of this action and that such jurisdiction could not be conferred even by consent.

II.

This court in construing the record entries by which John Barton Payne, Director General, was substituted for Walker D. Hines and by which James C. Davis, Director General, was substituted for John Barton Payne, has overlooked the very purpose of such substitution. It appears that such entry of appearance was made merely for the purpose of substitution and in order to adopt the answer and defense theretofore being made by the predecessors of the respective parties entering their appearance.

281 It is obvious from the very nature of the entry of appearance, the intention was not to abandon or to waive any defense theretofore asserted and being asserted by the predecessor of the person entering his appearance.

It is well stated in this state that whether the appearance is intended to be special or general is a question of intent to be determined by the facts at the time.

In the case of State ex rel. Bulger v. Southern, 278 Mo. 610 l. c. 621, the Supreme Court said:

"In an ordinary action an appearance solely to challenge jurisdiction for lack of service gives no jurisdiction of the person. Whether in such an action an appearance is general or special is one of intent and the intent is to be determined from the facts at the time."

We submit that it is obvious from the record entries themselves referred to by the court and from the fact that the defendant throughout the entire record continued to assert and re-assert the defense that the Cicuit Court did not have jurisdiction to entertain the action, such defense was not intended to be waived and was not waived and that under the decision of the Supreme Court of the United States in the case of Alabama and Vicksburg Railway Company against Journey, supra, the judgment of the trial court should be reversed.

III.

The plaintiff himself has now recognized and admitted that the Circuit Court did not have jurisdiction to entertain the subject matter of his cause of action, in that *that* it now appears from

282 the records of the Circuit Court of Jackson County, Missouri, that the plaintiff has filed another suit on the same cause of action which he has attempted to assert herein, and that suit is now pending returnable to the March term of the Circuit Court of Jackson County, Missouri. Such proceeding on his part, we submit, is a complete admission of the want of jurisdiction on the part of the Circuit Court in this suit.

IV.

We submit that the record fully and conclusively establishes that the verdict of the jury is grossly excessive. We again refer the court to each and all the authorities cited in appellant's brief and again call the court's particular attention to the solemn agreement of the plaintiff that the amount to be sued for should be limited to three thousand dollars and that his petition as first amended in accordance therewith, limited the amount of his recovery to that sum; that thereafter in violation of the solemn agreement of the parties the amount sued for was raised to a larger sum and that this court has permitted a verdict for a larger sum to stand notwithstanding such agreement solemnly entered into.

We submit that this court in discussing the question of excessive verdict has completely overlooked the effect of this agreement between the parties insofar as it constitutes an admission on the part of the plaintiff that he is not entitled to recover more than three thousand dollars and that this admission by plaintiff should conclusively preclude him from recovering any amount in excess of that sum regardless of what the court's decision may be as to the effect of the agreement as such.

283 We respectful-y submit that in the interests of justice a re-hearing of this cause should be granted in order that the matters herein referred to may be more fully presented to this court and in order that this court may consider the same on reargument, and before a final decision is reached herein. Respectfully submitted, Warner, Dean, Langworthy, Thomson & Borders, Attorneys for Appellant.

And thereafter, to-wit, on April 3, 1922, the court entered of record its order overruling appellant's motion for rehearing, in words and figures following, to-wit:

In Kansas City Court of Appeals.

[Title omitted.]

Order Overruling Motion for Rehearing.

Now at this day, the court having considered and fully understood the appellant's motion for a rehearing herein, doth consider and adjudge that the said motion be, and the same is hereby overruled. (Opinion filed).

Which said opinion is in words and figures as follows, to-wit:

In Kansas City Court of Appeals.

[Title omitted.]

Memorandum Opinion on Motion for a Rehearing.

There are a number of matters alluded to in the motion for a rehearing and suggestions in support thereof, some of which there is nothing in the record concerning, others that are raised for
284 the first time, and yet others that are fully considered and ruled adversely to defendant in the opinion. We do not feel that it is necessary to discuss the matters raised in the motion and suggestions except to say that the oral motion, made during the trial of the case, to require plaintiff to reduce the prayer of his petition to $3,000.00 because when defendant's counsel called the attention of plaintiff's counsel to the ruling of the judge of the Federal Court to the effect that the cause was removable the latter agreed to reduce the prayer to that sum, was merely a renewal without permission of the same motion already passed upon adversely to defendant, and was, therefore, properly overruled. (State ex rel. v. Buckner, 229 S. W. 392).

The motion for a rehearing is overruled.

Clerk's Certificate.

STATE OF MISSOURI, *sct:*

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in said court, in the cause entitled George Wechsler, Respondent, vs. John Barton Payne, Director General and Agent designated by the President under the Transportation Act of 1920, as fully as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court hereto, at office in Kansas City, this 24th day of June, 1922. L. F. McCoy, Clerk. (Seal.)

285 Record of All Proceedings in the Supreme Court of the State of Missouri upon Application for a Writ of Certiorari from the Judgment and Decision of the Kansas City Court of Appeals.

Caption.

In Supreme Court of Missouri.

UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that, heretofore, on the 27th day of April, 1922, there was filed in the office of the clerk of the Supreme Court of the

ate of Missouri a petition for a writ of certiorari (with exhibits and oof of notice attached) and suggestions in support thereof, in the se of State of Missouri ex rel. James C. Davis, Director General of ilroads and Agent designated by the President under Transporta- n Act 1920, Relator, vs. Francis H. Trimble, Ewing C. Bland, and enry C. Arnold, Judges of the Kansas City Court of Appeals, and eorge Wechsler, Respondents (No. 23686), which said petition for it of certiorari (with exhibits and proof of notice attached) and ggestions in support thereof is in the words and figures following, -wit:

And thereafter, and on the 22nd day of May, 1922, the following der was made and entered of record in said cause, to-wit:

In the Supreme Court of Missouri, April Term, 1922.

TATE OF MISSOURI ex rel. JAMES C. DAVIS, Director General of Railroads and Agent Designated by the President under Transportation Act 1920, Relator,

vs.

RANCIS H. TRIMBLE, EWING C. BLANK, and HENRY C. ARNOLD, Judges of the Kansas City Court of Appeals, and George Wechsler, Respondents.

66 Certiorari.

Order Denying Petition for Certiorari.

Now at this day, the court having considered and fully understood he petition heretofore filed by the said relator for a writ of certiorari erein, doth order that said writ be, and the same is hereby, denied.

In the Supreme Court of Missouri, April Term, 1922.

[Title omitted.]

Notice of Application for Writ of Certiorari.

o Honorable Francis H. Trimble, Honorable Ewing C. Bland and Honorable Henry C. Arnold, Judges of the Kansas City Court of Appeals, and George Wechsler and Messrs. Hogsett & Boyle, attorneys of record:

You and each of you, are notified that on Tuesday, May 2nd, 1922, pplication will be made by the relator, James C. Davis, Director Gen- al of Railroads and agent designated by the President under Trans- ortation Act 1920, to the Supreme Court of Missouri for the issu- nce of a writ of certiorari commanding the above named judges of he Kansas City Court of Appeals to certify, or cause to be certified, o the Supreme Court of the State of Missouri, as prayed for in the etition hereunto annexed, the record in an action entitled George Vechsler, Respondent vs. James C. Davis, Director General of Rail-

roads and agent designated by the President under Transpor-
287 tation Act 1920, No. 14267, which action was recently decided by the Kansas City Court of Appeals, as alleged in said petition. Annexed to this notice and made a part hereof is a copy of the petition for writ of certiorari, a true copy of the opinion of the Court of Appeals complained of, a copy of relator's motion for rehearing and the ruling of the Court of Appeals thereon, and a copy of the relator's suggestions in support of his petition. Warner, Dean, Langworthy, Thomson & Borders, Attorneys for Relator.

Service of the above notice is hereby acknowledged this 24th day of April, 1922. Hogsett & Boyle, Attorneys for Respondents.

In the Supreme Court of Missouri, April Term, 1922.

[Title omitted.]

Petition for Writ of Certiorari.

To the Honorable Judges of the Supreme Court of the State of Missouri:

The petition of the State of Missouri at the relation of James C. Davis, Director General of Railroads and agent designated by the President under Transportation Act 1920, respectfully represents and shows to the court as follows:

288 1. That the respondents, Honorable Francis H. Trimble, Ewing C. Bland and Henry C. Arnold, are now and were at the times herein mentioned the judges composing the Kansas City Court of Appeals.

2. That on the 1st day of March, 1921, respondent George Wechsler recovered a judgment in the Circuit Court of Jackson County, Missouri, at Kansas City in the sum of $5,000.00 and costs, against the relator in an action entitled George Wechsler, plaintiff vs. Walker D. Hines, Director General of Railroads, defendant, in which action the relator became defendant as successor by substitution; that thereafter an appeal was duly taken by the defendant to said Kansas City Court of Appeals, where said action came on for hearing on February 20th, 1922, at which time said Kansas City Court of Appeals delivered an opinion and made an order pursuant thereto affirming said judgment, a true copy of the opinion delivered by the Kansas City Court of Appeals at the time of affirming said judgment and the judgment entry thereon are hereto attached as a part of the certified copy of the proceedings in the Kansas City Court of Appeals relating to said cause and marked Exhibit "A."

3. That thereafter and during the same term of said Court of Appeals and within ten days of said decision of said court, relator duly filed in said court his motion for a rehearing, a copy of which is hereto attached and marked Exhibit "B"; that thereafter and on

April 3, 1922, said motion for a rehearing was denied by said Kansas City Court of Appeals, and an opinion delivered by said
289 court pursuant thereto, which said order and opinion are hereto attached as a part of a certified copy of the proceedings had in said court in said Kansas City Court of Appeals.

4. That in said action so brought by George Wechsler against the Director General of Railroads in the Jackson County Circuit Court, plaintiff sought to recover damages for personal injuries alleged to have been sustained by him while a passenger on a train being operated by the Director General of Railroads. The facts as found by the Court of Appeals were that the injury was caused by the train, upon which plaintiff was riding, leaving the track at Wyeth, Andrew County, Missouri; that plaintiff at the time of the accrual of his cause of action and at the time of the trial was a citizen and resident of the State of Illinois.

The Court of Appeals further finds that General Order 18-A of the Director General of Railroads provides that suits of this kind must be brought in the county or district where plaintiff resided at the time of the accrual of his cause of action, or county or district where the action arose; that the order is pleaded in the answer where it is alleged that plaintiff was a resident of the State of Illinois, and that his cause of action did not accrue in Jackson County, Missouri, where this suit was brought. The Kansas City Court of Appeals held that the provisions of said law could be and were waived by the defendant by appearing in the cause in the Jackson County Circuit Court.

290 It further appeared that said General Order No. 18-A was pleaded by the defendant as above stated, and that plaintiff in his reply denied the validity and asserted the invalidity of said general order.

It further appeared from the opinion of the Kansas City Court of Appeals that in the original petition plaintiff prayed damages in the sum of $15,000.00; that defendant filed petition and bond for removal to the Federal Court; that plaintiff through counsel stated to defendant that if he would withdraw the petition and bond for removal, plaintiff would reduce the amount sued for to $3,000.00. This was done, and thereafter plaintiff raised the amount sued for to $15,000.00, and the Court of Appeals held in the presence of an agreed statement at the trial as to the agreement of parties and absent objections to the proof of agreement, that defendant could not rely upon said agreement because not sufficiently pleaded.

5. That said ruling, decision and judgment so made by the Kansas City Court of Appeals is in direct conflict with the decisions of this court entitled, St. Louis v. Glasgow, 254 Mo. 262; Bray v. Marshall, 66 Mo. 122; Snitjer v. Downing, 80 Mo. 586; State ex rel. v. Nixon, 232 Mo. 496; McCary v. McCary, 217 S. W. 547; Little River Drainage District, 282 Mo. 458; each and all of which hold that jurisdiction over the subject matter of the litigation cannot be acquired by action of the parties through waiver, agreement or otherwise; that said General Order No. 18-A fixes the jurisdiction of the sub-
291 ject matter, and that the holding of the Kansas City Court of Appeals that this can be and was waived by the defendant

is in direct violation and contrary to said controlling decisions of this court.

6. That said decision of the Kansas City Court of Appeals in permitting the plaintiff to plead the invalidity of General Order No. 18-A and rely upon such pleading at the trial, and then to change entirely his theory of the case on appeal and claim a waiver thereof is contrary to and in direct violation of the controlling decisions of this court in Brier v. Bank, 225 Mo. l. c. 684; Kenefick-Hammond Co. v. Fire Ins. Co., 205 Mo. 294; Howell v. Jackson County, 202 Mo. l. c. 417; Gordon v. Million, 248 Mo. 155, in this that such decisions, and each of them, and numerous others of this court, uniformly hold that a party is precluded from adopting a theory on appeal inconsistent with the theory adopted at the trial of the case.

6*a*. The decision of the Court of Appeals is in conflict with the decision of this court in State ex. rel. Bulger v. Southern, 278 Mo. 610, in holding the action of defendant a general entry of appearance when clearly contrary to the expressed intention of the defendant.

7. The decision of the Kansas City Court of Appeals is in direct violation of and contrary to the decision of this court in Rivers v. Blom, 163 Mo. 442, in that this court held that a party cannot be heard to object for the first time on appeal to evidence on a compromise being admitted when the record fails to show that the
292 party objected to the admission of such evidence and saved his exception thereto. The defendant maintains and has maintained throughout that the contract reducing damages was not a compromise, but the Kansas City Court of Appeals seems to hold it a compromise, and in consequence contrary to the decision of this court as above stated.

8. Your relator files herewith his suggestions in support of this petition, and respectfully prays the court to exercise its powers of supervision over the records of the Kansas City Court of Appeals in said case of George Wechsler v. James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, being Cause No. 14267, in said Court of Appeals; that this court direct to be issued the state's writ of certiorari directed to said respondents, the judges of the Kansas City Court of Appeals, requiring them to certify to this court a true and perfect transcript of all and singular the records and proceedings in said cause, and that the judgment, order and decision of said Kansas City Court of Appeals in said cause hereinabove referred to, be quashed and for naught held, and that this court require the Kansas City Court of Appeals to reverse the judgment of the trial court against the defendant in said cause. Warner, Oean, Langworthy, Thomson & Borders, Attorneys for Relator.

Suggestions in Support of Petition for Writ of Certiorari.

I.

General Order No. 18 of the Director General of Railroads
293 as amended by General Order No. 18-A, which were in force

t the time in question recites the injurious consequences in ermitting suits against the Director General to be filed in jurisdic- ions remote from where the plaintiffs resided, or where the cause f action arose, and then orders:

"It is therefore ordered that all suits against carriers while under ederal control must be brought in the county or district where he plaintiff resided at the time of the accrual of the cause of ac- ion, or in the county or district where the cause of action arose."

It is conceded that this action was instituted by George Wechsler contrary to and in violation of the provisions of this general order. This suit was originally instituted against Walker D. Hines as Di- rector General of Railroads. He filed an answer pleading Gen- eral Order No. 18-A, and the jurisdiction of the court on account of the violation thereof. After John Barton Payne had been made the successor of Hines, he was by agreement of parties substituted as defendant, and in the order of substitution the following entry was made, as appears from the decision of the Court of Appeals:

"Thereafter and on February 25, 1921, and during the January Term, 1921, of said court, plaintiff again amended his petition by interlineation, and John Barton Payne, Director General of Rail- roads and Agent designated by the President under Transportation Act, 1920, was substituted by agreement as successor of Walker D. Hines, and said substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant, and the court made an entry of record
294 that such proceedings were had."

The Court of Appeals held that this entry constituted a general entry of appearance of John Barton Payne, although the answer adopted contained an express plea to jurisdiction of the court, and further held that the provisions of General Order No. 18-A were thereby waived.

That General Order No. 18-A relates to the jurisdiction of the subject-matter is clearly shown from the very language of the order itself and the language of the United States Supreme Court in the case of Alabama & Vicksburg Railroad Company v. Journey, 42 Sup. Ct. Rep. 6, which upholds the validity of said general order. In that case the language of the order is definite, unambiguous and, we submit, not subject to any other construction than that it was intended thereby to prohibit any court from taking jurisdiction of the subject matter of the action, excepting courts within the territorial limits prescribed.

It is well settled that the jurisdiction of the subject matter cannot be waived by the voluntary appearance of the parties and that where the court is denied jurisdiction of the subject matter, such jurisdiction cannot be conferred by consent of the parties.

Title Guaranty and Surety Company v. Drennan, (Mo. App.) 208 S. W. 474.

St. Louis v. Glasgow, 254 Mo. 262 l. c. 290.

4 Corpus Juris, 1249.

The order of the Director General has the effect of taking away for the time being the transitory nature of suits for personal
295 injuries and making them local in their nature and requiring them to be brought in certain jurisdictions only.

The case is not unlike those involving statutes which require suits relating to real estate to be brought within the counties in which the real estate lies. In such cases the Circuit Court in another county would not have jurisdiction to entertain an action notwithstanding it is a court of general jurisdiction and such jurisdiction could not be conferred by consent.

Bray v. Marshall, 66 Mo. 122.
Snitjer v. Downing, 80 Mo. 586.

Likewise the Courts of Appeal have jurisdiction of cases appealed from the Circuit Courts of certain counties only and they could not acquire jurisdiction even by consent of appeals taken from Circuit Courts in counties other than those specified by statutes.

State ex rel. v. Nixon, 232 Mo. 496.

Furthermore, the jurisdiction of Courts of Appeal is limited to cases involving seventy-five hundred dollars and less. Clearly the jurisdiction could not be conferred upon the Court of Appeals by consent of parties in cases involving an amount greater than that sum.

McCary v. McCary, 217 S. W. 547.
Little River Drainage District, 282 Mo. 458.

We submit, therefore that the Court of Appeals has overlooked the explicit and definite language of General Order Number 18-A from which it appears that the Circuit Court of Jackson County, Missouri, did not have jurisdiction of the subject matter of this action and that such jurisdiction could not be conferred even by consent.

296 We are advised that the case of Mary McGrath v. Director General, involving the question of whether or not General Order No. 18-A relates to the subject matter is now before this court en banc, and respectfully suggest that space does not permit us an opportunity to brief the point fully here, and that the decision of the court await the court's conclusion upon the point in the case of Mary McGrath v. Director General.

In the second place, this entry did not constitute a general entry of appearance, because as a part of the entry itself an answer was adopted denying the jurisdiction of the court, and the ruling of the Kansas City Court of Appeals is in violation and contrary to the ruling of this court in State ex rel Bulger v. Southern, 278 Mo. 610.

II.

The Court of Appeals by its decision and opinion in this case permitted plaintiff to try this case upon the theory that General Order 18-A was invalid, and the invalidity thereof was expressly

pleaded by plaintiff in reply. Even in appellate brief respondent cities numerous cases holding the general order invalid, and yet the Kansas City Court of Appeals permitted respondent an appeal to entirely abandon the theory adopted by him at the trial, and claim that General Order 18-A was not invalid, but was valid and had been waived. This did not give the appellant an opportunity to meet the issues thus raised on appeal, and its permission by the Kansas City Court of Appeals is contrary to the rulings of this court in cases cited in the foregoing petition and numerous others.

297 III.

The Court of Appeals held that the appellant could not rely upon agreement of the plaintiff to reduce damages asked for to $3,000.00, because the contract upon which the reduction was based had not been pleaded. Yet the opinion fails to show that any objection was made to proof of the facts. The Court of Appeals could have found consistent with the true facts that the contract for the reduction of damages was agreed to. Even assuming the contract of reduction of damages to be a compromise settlement of all amount over $3,000 even then the decision of the Court of Appeals is contrary to the decision of this court in Rivers v. Blom, 163 Mo. l. c. 448, this court said:

"In the case at bar, however, it does not appear from the record before this court that when the evidence which showed the compromise of the cross actions between Blom and Geimer was offered or adduced, the defendant made timely or any objection thereto on the ground that it was not admissible because no such issue had been joined in the case, or for any other reason, nor does it appear that defendant saved any exception to the admission of this evidence, nor that the error was called to the attention of the trial court in the motion for a new trial and that the court afforded thereby an opportunity to correct the error. This being so, the defendant can not be heard to object, for the first time, in this court, to the evidence being admitted. And as the evidence is in the case and as it completely bars the defendant's right to recover under the third counterclaim, it only remained for the referee and the trial court to pronounce the judgment of the law thereon.

298 For these reasons the judgment of the Circuit Court is affirmed. All concur."

We submit that writ of certiorari should be issued. Warner, Dean, Langworthy, Thomson & Borders, Attorneys for Relator.

Exhibit A to Petition for Certiorari.

STATE OF MISSOURI, *set:*

Be it remembered, that heretofore, to-wit, on the 20th day of February, 1922, the Kansas City Court of Appeals entered of record the following judgment:

[Omitted; printed p. 262.]

And thereafter, to-wit, on April 3, 1922, the court entered of record its order overruling the appellant's motion for a rehear-
299 ing, in words and figures following to-wit:

[Omitted; printed p. 283.]

STATE OF MISSOURI, *sct:*

[Omitted; printed p. 284.]

GEORGE WECHSLER, Respondent,

v.

JAMES C. DAVIS, Director General of Railroads, etc., Appellant.

No. 14267.

[Omitted; printed p. 283.]

300–312

Memorandum Opinion on Motion for a Rehearing.

In the Kansas City Court of Appeals, October Term, 1921.

Opinion.

[Omitted; printed p. 263.]

313-319

Exhibit B to Petition for Certiorari.

In the Kansas City Court of Appeals, October Term, 1921.

No. 14267.

GEORGE WECHSLER, Respondent,

v.

JAMES C. DAVIS, Director-General of Railroads and Agent Designated by the President Under Transportation Act of 1920, Appellant.

Appellant's Motion for Rehearing.

[Omitted; printed p. 276.]

320 STATE OF MISSOURI, *sct:*

Clerk's Certificate.

Supreme Court of Missouri.

I, J. D. Allen, clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the Petition for Writ of Certiorari (with exhibits and proof of notice attached) and Suggestions in support thereof, and of the order of said Supreme Court denying said writ, in the case of State of Missouri ex rel. James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, Relator, vs. Francis H. Trimble, Ewing C. Bland, and Henry C. Arnold, Judges of the Kansas City Court of Appeals, and George Wechsler, Respondents, No. 23686, as fully as the same appear of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson, State aforesaid, this 9th day of June, 1922. J. D. Allen, Clerk of the Supreme Court of the State of Missouri. [L. S.]

STATE OF MISSOURI, *sct:*

Clerk's Certificate.

Kansas City Court of Appeals.

I, L. F. McCoy, clerk of the Kansas City Court of Appeals, do hereby certify that the above and foregoing includes a full,
321 true and complete transcript of the records and proceedings had in said court in the cause entitled George Wechsler, Respondent, vs. John Barton Payne (sometimes styled James C. Davis, who as his successor was substituted), Director General of Railroads and Agent designated by the President under Transportation Act 1920, Appellant, as fully as the same remain of record and on file in my office.

I further do hereby certify that the above and foregoing includes a full, true and complete transcript of the record and proceedings had in the Supreme Court of the State of Missouri in said cause, according to a copy thereof duly certified by the clerk of the Supreme Court of the State of Missouri, and now on file and of record in my said office.

I do further certify that the above and foregoing contain a full, true and complete copy of the abstract of the record in said cause of all proceedings had therein in the Circuit Court of Jackson County, Missouri, at Kansas City, as fully as the same remain of record and on file in my said office.

179

In testimony whereof, I have hereunto set my hand and affixed the seal of said court hereto at my office in Kansas City, Missouri, this 30 day of June, 1922. L. F. McCoy, Clerk. [Seal of Kansas City Court of Appeals.]

322 **Writ of Certiorari and Return.**

[Filed Nov. 11, 1922.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Kansas City Court of Appeals of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, Director General of Railroads and Agent Designated by the President under Transportation Act 1920, is appellant, and George Wechsler is respondent, No. 14267, which suit was removed into the said Kansas City Court of Appeals by virtue of an appeal from the Circuit Court of Jackson County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Kansas City Court of Appeals and removed into the Supreme Court of the United
323 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. H. Stansbury, Clerk of the Supreme Court of the United States.

324 [Endorsed:] File No. 29,012. Supreme Court of the United States, October Term, 1922. No. 462. James C. Davis, Director General of Railroads, etc., vs. George Wechsler. Writ of Certiorari.

325 In the Supreme Court of the United States, October Term, 1922.

No. 462.

JAMES C. DAVIS, Director General of Railroads and Agent Designated by the President under Transportation Act 1920, Petitioner,

vs.

GEORGE WECHSLER, Respondent.

Stipulation.

It is stipulated by and between the parties hereto that the Record already on file in the office of the Clerk of the Supreme Court of the United States may be taken as a return to the writ of certiorari in the above entitled cause. O. H. Dean, H. M. Langworthy, Roy B. Thomson, M. W. Borders, Counsel for Petitioner. William S. Hogsett, Murat Boyle, Mont Prewitt, Counsel for Respondent.

326 STATE OF MISSOURI, *sct:*

I, L. F. McCoy, clerk of the Kansas City Court of Appeals, do hereby certify that the foregoing stipulation in the cause entitled James C. Davis, Director General of Railroads and Agent designated by the President under Transportaton Act, 1920, Petitioner vs. George Wechsler, Respondent, is a true and perfect copy of the said stipulation filed by and between the parties hereto; that the Record already on file in the office of the clerk of the Supreme Court of the United States may be taken as a return to the Writ of Certiorari in the above entitled cause as fully as the same remains on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court. Done at my office in Kansas City, Missouri, this 31st day of October, 1922. L. F. McCoy, Clerk of the Kansas City Court of Appeals. [Seal of the Kansas City Court of Appeals.]

327 [Endorsement omitted.]

[File endorsement omitted.]

328 [File endorsement omitted.]

INDEX.

Supplemental Brief of Petitioner in Support of Writ of Certiorari. 1
Statement of Facts. 3
The Questions Involved and Specification of the Errors Relied on. 9
Brief in Support of Petition for Writ of Certiorari 10
General Order No. 18-a. 10

Citations.

Alabama and Vicksburg Ry. Co. vs. Journey, 42 Sup. Ct. Rep. 6. 10
Bray vs. Marshall, 66 Mo. 122. 13
Carr vs. U. S., 98 U. S. 433 19
Creswill vs. Knight, 225 U. S. 246 23
Douglass vs. Lewis, 131 Mo. 75 18
Ex Parte Ayres, 123 U. S. 443. . . . . 16, 17
Goldsmith vs. Revenue Cutter, 6 Oregon, 250. 20
General Order No. 18-a. 10, 11, 14
Hans vs. Louisiana, 134 U. S. 1. 17
Hagood vs. Southern, 117 U. S. 52, 67. 16
In re E. J. Hibner Oil Co., 264 Fed. 667. 16
Lewis' Southerland Statutory Construction (2nd Ed.) Sec. 558 19
Little River D. D., 282 Mo. 458 13
McArthur Bros. Co. vs. Commonwealth, 197 Mass. 137 19
Mason vs. Cooper, 19 Georgia 543 19
Mo. Pac. Ry. Co. vs. Ault, 256 U. S. 554. 16

McCary vs. McCary, 217 S. W. 547 13
Miller vs. Amr. Bonding Co., 42 Sup. Ct. Rep. 98 18
Northern Pac. Ry. Co. vs. North Dakota, 250 U. S. 135. 16
Snitzer vs. Downey, 80 Mo. 586 13
State ex rel. vs. Nixon, 232 Mo. 496 13
State ex rel., Bulger vs. Southern, 278 Mo. 610, l. c. 621. 15
St. Lewis vs. Glasgow, 254 Mo. 262 l. c. 290 12
Stanley vs. Schwalby, 162 U. S. 255 19
Troy & Greenfield Ry. vs. Commonwealth, 127 Mass. 43 19
Title Guaranty & Sec. Co. vs. Drennan (Mo. App.), 208 S. W. 474 12
U. P. R. R. Co. vs. Pub. Ser. Com., 248 U. S. 67 22
U. S. ex rel. Texas Portland Cement Co. vs. McCoy, 233 U. S. 152 17
Western Union Tel. Co. vs. Poston, 256 U. S. 662 18
Ward vs. Love County, 253 U. S. 17 ..... 21, 22
39 Cyc. 776 20
4 Corpus Juris, 1349 12

No. 29012.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 70.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AND AGENT DESIGNATED BY THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, PETITIONER,

VS.

GEORGE WECHSLER, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI.

The petitioner herein filed in this Honorable Court with his petition for writ of certiorari a statement of the case and specification of the errors relied upon, which were entitled, "The Questions Involved," and a brief and argument and the authorities relied upon in support thereof, all of which is embodied herein for more ready reference by the court, where the references relate to

the record prepared under the supervision of the clerk of this court instead of to the record filed by the petitioner. The purpose of this supplementary brief is to present additional points and authorities in support thereof under Subdivision II entitled, "Neither the petitioner herein nor his predecessor waived the provisions of General Order 18-A, but upon the contrary urged its enforcement throughout."

STATEMENT OF FACTS.

This action was originally instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, by the respondent herein against Walker D. Hines, as Director General of Railroads for damages for personal injuries alleged to have been sustained by respondent on January 3, 1920, while a passenger on a passenger train operated by Walker D. Hines, Director General of Railroads. Hines was your petitioner's predecessor operating the Chicago Great Western Railroad. The injury was caused by the train becoming derailed at Wyeth, Andrew County, Missouri. Plaintiff therein at the time of the accrual of his cause of action, and at the time of the trial, was a citizen and resident of the State of Illinois.

Long prior to the injury complained of and under date of April 9th, 1918, W. G. McAdoo as Director General of Railroads issued an order generally known and designated as General Order No. 18, which is as follows:

General Order No. 18.

"Whereas the Act of Congress approved March 21, 1918, entitled *An Act to Provide for the Operation of Transportation Systems While Under Federal Control*, provides (Section 10) 'That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at

common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control'; and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs,

It is therefore ordered, that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

W. G. McAdoo,
Director General of Railroads."

Thereafter and under date of April 18, 1918, said McAdoo as such Director General issued what is generally known and designated as General Order No. 18-A, which is as follows:

"General order No. 18 issued April 9, 1918 is hereby amended to read as follows:

'It is therefore ordered that all suits against carriers while under Federal control must be

brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.'

W. G. McAdoo,
Director General of Railroads."

This suit was instituted by respondent by filing his petition in the Circuit Court of Jackson County, Missouri on January 29th, 1920, and at sundry times thereafter made amendments thereto. The defendant answered on January 23, 1921, in addition to a general denial as follows (Record, page 7):

"Defendant further answering plaintiff's amended petition states that at all times mentioned in plaintiff's amended petition there was in full force and effect and binding upon the parties hereto a certain law embodied in general order of the Director General of Railroads known and described as General Order No. 18-A, issued April 18, 1918, wherein and whereby it is provided that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.

Defendant further states that plaintiff, at the time plaintiff charges he was injured and at the time of the institution of this suit, was not a resident of Jackson County, Missouri, nor of the district in which this suit was filed, but was a resident of the State of Illinois; that plaintiff further charges that he was injured at a point near Wyeth, Missouri, and that said point is not located in Jackson County, Missouri, and not in either the county or the district in which suit was filed, and therefore, that said suit was not instituted or brought

> either in the county or district where the plaintiff resided at that time of the accrual of the cause of action or in the county or district where the cause of action arose; and that in consequence thereof, this court is without jurisdiction to try or determine any issues in this case or to proceed therewith.
>
> Wherefore, defendant prays that said cause be dismissed."

Thereafter, on February 26, 1921, plaintiff therein filed a reply which, so far as material here, is as follows (Record, page 9):

> "Plaintiff denies that general order No. 18a referred to in the answer was in full force and effect and binding upon the parties hereto, and denies that same was a law affecting or controlling the parties hereto, and denies that this court is without jurisdiction to try and determine the issues in that case.
>
> Plaintiff states that said general order No. 18a is now and at all times referred to in the petition was wholly and utterly void and beyond the powers of the Director General of Railroads to make or enforce, and in conflict with the Act of Congress, March 21st, 1918, which provided that actions at law might be brought against carriers and judgments rendered as then provided by law."

On February 25, 1921, and after the filing of said answer and *one day before* filing said reply, the Circuit Court made an order substituting John Barton Payne as defendant for Walker D. Hines, resigned. This substitution thus appears in the record on page 8:

> "Thereafter and on February 25th, 1921, and during the January Term, 1921, of said court, plaintiff again amended his petition by interlinea-

tion, and John Barton Payne, director general of railroads and agent designated by the President under Transportation Act 1920, was substituted by agreement as successor of said Walker D. Hines, and said substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant, and the court made an entry of record that such proceedings were had. Said amendment to said petition in addition to the substitution of defendant as aforesaid was as follows:"

Your petitioner herein and defendant in the trial court objected at all stages of the proceeding to the jurisdiction of the Jackson County Circuit Court, because not within the county or district where the cause of action arose, nor where plaintiff resided. In answer to this objection during the trial, plaintiff's counsel said (Record, page 16):

> "In answer to the suggestion of counsel for the defendant, I call the attention of the court to the fact that General Order No. 18-A in direct conflict with the Act of Congress of March 21, 1918, which provides that actions at law may be brought against carriers, and judgments returned, as provided by law; that the Act of Congress antedated the so-called 'General Order' of the Director General of Railroads No. 18-A, the act having been passed March 21, 1918, and the General Order 18-A having been issued of date some time near April, 1918. I call the court's further attention to the fact that it has been held by every court in the United States which has had occasion to pass on the matter, that the so-called Order No. 18-A is wholly and utterly void because it is in conflict with the Act of Congress, herein referred to."

After the trial of this case and before the decision by the Kansas City Court of Appeals, and on November 7, 1921, this Honorable Court decided in the case of *Alabama and Vicksburg Ry. Co.* v. *Journey*, 42 Supreme Court Reporter 6, that General Order No. 18-A was valid and binding.

The Kansas City Court of Appeals held that by the entry of substitution above quoted the defendant waived the provisions of General Order 18-A, although as a part of the order the defendant adopted the answer pleading the lack of jurisdiction of the court, and although no waiver was suggested by pleading or otherwise in the trial court.

From this decision of the Kansas City Court of Appeals rendered on April 3, 1922, your petitioner applied to the Supreme Court of the State of Missouri for a writ of certiorari, by reason of said court having a supervisory control over the decisions of said Court of Appeals, which application was denied on May 22, 1922.

THE QUESTIONS INVOLVED AND SPECIFICATION OF THE ERRORS RELIED ON.

Your petitioner further states that the questions involved herein and the errors relied upon are as follows:

First. General Order No. 18-A of the Director General of Railroads relates to jurisdiction over the subject matter of the action, and is not subject to waiver by the parties or either of them.

Second. Neither the petitioner nor his predecessor waived the provisions of General Order 18-A, but on the contrary urged its enforcement throughout.

Third. The non Federal grounds upon which the Kansas City Court of Appeals attempts to dispose of this case are entirely untenable, and are in no sense binding on this court. The federal question is inherently involved and is the only tenable basis of decision.

Fourth. The decision of the Kansas City Court of Appeals deprives this petitioner of his rights of defense given him under the laws of the United States, and particularly General Order 18-A of the Director General of Railroads.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

General Order No. 18-A of the Director General of Railroads relates to jurisdiction over the subject matter of the action, and is not subject to waiver by the parties, or either of them.

This suit was instituted contrary to and in direct violation of the provisions of General Order Number 18-A of the Director General of Railroads for the reason that at all times the plaintiff was a citizen and resident of the State of Illinois, and the cause of action accrued at or near Wyeth, in the County of Andrew, State of Missouri, while the suit was instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, and thus it is necessary to determine the effect of General Order Number 18-A as bearing upon the validity or invalidity of the decision of the Missouri courts in this case.

In *Alabama and Vicksburg Railway Co.* v. *Journey*, 42 Supreme Court Reporter 6, this Honorable Court decided that General Order No. 18-A of the Director General of Railroads was valid and binding.

In that case, this court referring to General Order No. 18-A states that such order:

> "PROHIBITED the institution of suits against railroads under Federal control in the court for any district other than that which the plaintiff

had resided or in which the alleged cause of action arose."

General Order Number 18-A referred to in the opinion of the court provides that:

> "All suits against carriers while under Federal control MUST be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

The Kansas City Court of Appeals in its opinion in this case holds:

> "The Circuit Court of Jackson County, Missouri, had jurisdiction of the subject matter of this suit but under General Order Number 18-A had no jurisdiction over the person of defendant's predecessor, Hines, unless he chose to voluntarily submit to the jurisdiction of the court."

That court then proceeded to hold that under the record entries as shown by the abstract of record the appellant, James C. Davis, Director General and Agent and his predecessor, John Barton Payne, had entered their voluntary appearance, and that therefore the provisions of General Order Number 18-A did not apply.

This ruling and decision overlook the very language itself of General Order Number 18-A and the language of this court in construing General Order Number 18-A, from both of which it conclusively appears that the Circuit Court *did not have jurisdiction of the subject matter of this action;* that by the very terms of the Order, no court had jurisdiction of the subject matter of the action excepting certain courts

within certain territorial limitation prescribed in the Order.

It appears from the very purpose of the making of this Order, that it was the intent of the Director General that there should be a territorial limit within which suits might be brought and without which suits could not be brought. A reference to General Order Number 18 (afterwards amended as 18-A) shows that the purpose of this order was to save the expense and time of having railroad witnesses in attendance at the trial of suits at places far distant from the place of their usual employment. Consequently the Order provides that *suits* against carriers while under Federal control *must* be brought within certain districts.

The language of the Order is definite, unambiguous and, we submit, not subject to any other construction than that it was intended thereby to PROHIBIT ANY COURT FROM TAKING JURISDICTION OF THE SUBJECT MATTER OF THE ACTION, excepting courts within the territorial limits prescribed.

It is well settled that the jurisdiction of the subject matter cannot be waived by the voluntary appearance of the parties and that where the court is denied jurisdiction of the subject matter, such jurisdiction cannot be conferred by consent of the parties.

Title Guaranty and Surety Company v. *Drennan*, (Mo. App.) 208 S. W. 474.
St. Louis v. *Glasgow*, 254 Mo. 262, l. c. 290.
4 Corpus Juris, 1349.

The order of the Director General has the effect of taking away for the time being the transitory nature of suits for personal injuries and making them local in their nature and requiring them to be brought in certain jurisdiction only.

The case is not unlike those involving statutes which require suits relating to real estate to be brought within the counties in which the real estate lies. In such cases the Circuit Court in another county would not have jurisdiction to entertain an action notwithstanding it is a court of general jurisdiction and such jurisdiction could not be conferred by consent.

Bray v. *Marshall*, 66 Mo. 122.
Snitzer v. *Downey*, 80 Mo. 586.

Likewise the Courts of Appeal in Missouri have jurisdiction of cases appealed from the Circuit Courts of certain counties only and they could not acquire jurisdiction even by consent of appeals taken from Circuit Courts in counties other than those specified by statutes.

State ex rel. v. *Nixon*, 232 Mo. 496.

Furthermore the jurisdiction of Courts of Appeal is limited to cases involving seventy-five hundred dollars and less. Clearly the jurisdiction could not be conferred upon the Court of Appeals by consent of parties in cases involving an amount greater than that sum.

McCary v. *McCary*, 217 S. W. 547.
Little River Drainage District, 282 Mo. 458.

We submit therefore that the Kansas City Court of Appeals has overlooked the explicit and definite language

of General Order Number 18-A from which it appears that the Circuit Court of Jackson County, Missouri, DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION, and that such jurisdiction could not be conferred even by consent.

II.

Neither the petitioner herein nor his predecessor waived the provisions of General Order Number 18-A, but upon the contrary urged its enforcement throughout.

Assuming for the sake of argument (though vehemently denying it as a matter of fact) that General Order Number 18-A of the Director General of Railroads relates to the jurisdiction over the person, and was in consequence thereof subject to waiver by the parties, even under these circumstances there was no waiver by this petitioner or his predecessor as Director General of Railroads.

The order of the trial court which is claimed to be a basis of the waiver of the provisions of General Order Number 18-A made on February 25th, 1921, was simply an order of substitution of defendants and expressly provides as an inherent part of the order of substitution that the incoming defendant, John Barton Payne, adopted the answer therefore filed by said Walker D. Hines, his predecessor. The answer which was thus adopted expressly pleaded General Order Number 18-A, and that in consquence thereof, that the court was entirely without jurisdiction to try or determine any issues in said case, or to proceed therewith. *The next day*

following the substitution of the defendants and on February 26th, 1921, the plaintiff filed a reply to said answer alleging that General Order No. 18-A was invalid and void because in conflict with the Act of Congress of March 21, 1918, which provided that actions at law might be brought against the carrier and judgment rendered as then provided by law. This, we submit, was absolutely inconsistent with any thought of waiver.

The plaintiff did not at that time nor at any other time in the trial court allege, claim or charge a waiver of the provisions of General Order 18-A. The issue was squarely made by the pleadings whether this order was valid or void. This court thereafter held in the Journey case that it was valid.

The records above referred to show clearly and emphatically that the substituted defendant did not intend to and did not in fact enter a general appearance, and that the order was not treated as a general appearance by the parties or by the court.

In the case of *ex rel Bulger* v. *Southern*, 278 Mo. 610, l. c. 621, the Missouri Supreme Court says:

> "In an ordinary action an appearance solely to challenge jurisdiction for lack of service gives no jurisdiction of the person. Whether, in such an action, an appearance is general or special is one of intent, and the intent is to be determined from the facts at the time."

Not only was the order of substitution treated as a special appearance by the parties at the time the order was made, but the contention of the parties was contin-

ued at the trial as to the validity or invalidity of General Order Number 18-A.

After trial and judgment the petitioner was substituted as defendant, but this could not affect jurisdiction to try the cause.

(The following under this question does not appear in the original brief filed by the petitioner in this cause):

It is beyond argument now that the United States took a complete and not a divided control of the railroad systems, and that the United States operated them directly and without the intervention in any way of the owners.

Northern Pacific Ry. Co. v. *North Dakota*, 250 U. S. 135.
Mo. Pac. R. R. Co. v. *Ault*, 256 U. S. 554.

It is also beyond question that actions and suits against the Director General of Railroads or the Agent designated by the President under Transportation Act, 1920, were suits against the United States. The real party in interest was the United States, and the court will always consider the nature of the case, and determine whether the Government is the real party in interest, although it is not named.

Ex parte Ayers, 123 U. S. 443.
Hagood v. *Southern*, 117 U. S. 52, 67.
In re E. J. Hibner Oil Co., 264 Fed. 667.
Cases cited in preceding paragraph.

It also seems beyond argument that the United

States cannot be sued without its consent. This is a privilege of sovereignty.

Hans v. *Louisiana*, 134 U. S. 1.
Ex parte Ayers, 123 U. S. 443.

The statutes which permit the United States to be sued, or which strip the Government of any portion of its prerogatives are in derogation of its sovereignty and will be most strictly construed.

It will be borne in mind that the law in question giving individuals a right to sue the United States in certain cases is not a limitation or restriction of a cause of action theretofore existing, but is the creation of a new liability.

United States, ex rel. Texas Portland Cement Co. v. *McCoy*, 233 U. S. 157, is a case which involves the statute giving the creditors of a contractor for the United States the right to sue in the name of the United States upon the contractor's bond, if the United States itself did not bring suit within six months. In that case the United States did not sue, and indicated that it would not sue, and thereupon a suit was brought by a creditor of the contractor in the name of the United States before the expiration of the six months period. Other creditors intervened in the suit after the expiration of the six months period, and within the time provided by law. This Honorable Court held that the plaintiff in the suit was not entitled to recover because not brought within the limitations of the law creating the right to sue, and on page 162 said:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself. *Pollard* v. *Bailey*, 20 Wall. 520, 526-7; *Bank* v. *Francklyn*, 120 U. S. 747, 756; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *United States* v. *Boomer*, 183 Fed. Rep. 726 (Circuit Court of Appeals for the Eighth Circuit).

"The purpose of Congress to give the United States the exclusive right to bring suit within six months is stated in terms too plain to be mistaken or to require construction, because of any possible uncertainty in their meaning. When this is so it becomes unnecessary to inquire into the reasons which induced the legislation."

Western Union Telegraph Co. v. *Poston*, 256 U. S. 662.

Miller v. *American Bonding Co.*, 42 Sup. Ct. Rep. 98.

Douglass v. *Lewis*, 131 Mo. 75.

In *Northern Pacific Railway Company* v. *Whalen*, 149 U. S. 157, this court in passing upon the right of a railroad company to enjoin keepers of saloons near the line of its roads from maintaining such a place as a

nuisance, says with respect to the statute upon subject (l. c. 164):

> "But this section, creating a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms."
>
> Lewis' Sutherland Statutory Construction, (Second Ed.) Sec. 558.
>
> *Troy & Greenfield R. R. Co.* v. *Commonwealth*, 127 Mass. 43.
>
> *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137.
>
> *Mason* v. *Cooper*, 19 Georgia, 543.

The petitioner herein as Director General of Railroads could not enlarge the powers given by Congress to sue the United States. In other words, if the respondent herein did not have authority under the law to institute this suit in the manner pursued by him, then this authority could not be granted by the Director General of Railroads, much less by the trial attorney acting for him in a given case.

Thus, in the case of *Carr* v. *United States*, reported in 98 U. S. 433, it was held that consent by the United States to be sued, must be evidenced by an act of Congress, and that Government officers cannot waive the privilege of the United States in this respect.

And again, in the case of *Stanley* v. *Schwalby*, 162 U. S. 255, this court speaking through Mr. Justice Gray said at page 269:

> "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this

> case, that no suit can be maintained against the United States, or against their property, in any court without express authority of Congress. 147 U. S. 512. See also *Belknap* v. *Schild,* 161 U. S. 10. The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a state in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. *Case* v. *Terrell,* 11 Wall. 199, 202; *Carr* v. *United States,* 98 U. S. 433, 438; *United States* v. *Lee,* 106 U. S. 196, 205."

It has been held by the Supreme Court of Oregon in the case of *Goldsmith* v. *Revenue Cutter,* 6 Oregon, 250, that even by pleading to the merits, the Government of the United States does not waive its exemption from process. It, therefore, follows from the authorities that one bringing suit against the United States must bring himself directly within an act of Congress authorizing the suit.

The principle is thus expressed in 39 Cyc., 776:

> "Consent by the United States to be sued must be evidenced by an act of Congress, and Government officers cannot waive its privilege in this respect, or lawfully consent that such a suit may be prosecuted so as to bind it."

III.

The non-federal grounds upon which the Kansas City Court of Appeals attempts to dispose of this case are entirely untenable and are in no sense binding upon this court. The federal question is inherently involved and is the only tenable basis of decision.

We have endeavored to show that the position taken by the Kansas City Court of Appeals to the effect that there was a waiver by the petitioner's predecessor of the provisions of General Order Number 18-A, is entirely untenable and not founded in any sense upon the facts and circumstances shown by the record in this case. Therefore, the question for decision is within the jurisdiction of this court, and it is within the province of this court to determine not only whether the right given to petitioner and his predecessor under the provisions of General Order 18-A were denied in express terms, but also whether or not they were denied in substance or effect by putting forward non-federal grounds of decisions that were without any fair or substantial support.

In *Ward* v. *Love County*, 253 U. S. 17, on pages 21 and 22, the court says:

> "The county challenges our jurisdiction by a motion to dismiss the writ of certiorari and by way of supporting the motion insists that the Supreme Court put its judgment entirely on independent non-federal grounds which were broad enough to sustain the judgment."
>
> * * * * * * *
>
> "Whether the right was denied, or not given due recognition, by the Supreme Court is a ques-

tion as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It, therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67; *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co.* v. *South Bend*, *ibid.* 359, 367; *Gaar Scott & Co.* v. *Shannon*, 223 U. S. 468; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164. And see *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443; *Hunnington* v. *Attrill*, 146 U. S. 657, 683-684; *Boyd* v. *Thayer*, 143 U. S. 135, 180; *Carter* v. *Texas*, 177 U. S. 442, 447. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review may easily be avoided. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, 589."

In *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67 (syllabus):

> "A Utah corporation, operating an extensive railroad through several states, with but slight mileage, and small proportion of its property, and no intrastate business, in Missouri, seeking to issue over $30,000,000 bonds under mortgage of its whole line to meet expenditures incurred but in small part in that state, was charged for the privilege, by a Missouri commission, over $10,000, calculated by a percentage of the entire issue. Held, a direct, unconstitutional interference with interstate commerce."

Upon these facts this court says on page 69:

> "The Supreme Court of the state avoided this question by holding that the application to the Com-

mission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court. But the later decisions show that such is not the law and that on the contrary it is the duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. *Creswill* v. *Knights of Pythias,* 225 U. S. 246. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor,* 223 U. S. 280."

This court then holds that the constitutional question was not waived regardless of the State Court decision, and rendered judgment accordingly.

In *Creswill* v. *Knight of Pythias,* 225 U. S. 246, this court on page 261 declare this doctrine as follows:

"While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and findings of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary

to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City So. Ry. Co.* v. *Albers Com. Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, Ib. 655, 668; *State of Washington ex rel* v. *Fairchild*, 224 U. S. 510. The contentions here made bring this case under the first category, since the insistence here is that there was not any evidence justifying the findings made by the court concerning fraudulent purpose, injury to property, deception of the public, etc."

We submit that the conclusion of the Kansas City Court of Appeals upon the question of waiver was without any fair or substantial support. If such a decision was binding upon this court, it may thus be seen that the power to review given under the law to this court may easily be avoided.

We submit that the petitioner and his predecessor in this case were deprived of the rights given to them under the federal law bearing upon jurisdiction of the court, and that the writ of certiorari should go.

O. H. DEAN,
ROY B. THOMSON,
ALBERT E. STOLL,
Attorneys for Petitioner.

FILED
OCT 1 1923
WM. R. STANSBU
CLE

No. 29012.

In the

Supreme Court of the United States

October Term, 1923.

No. 70.

JAMES C. DAVIS, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, *Petitioner*,

vs.

GEORGE WECHSLER, *Respondent*.

RESPONDENT'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. HOGSETT,
MURAT BOYLE,
MONT T. PREWITT,
Counsel for Respondent.

SMITH-GRAVES LAW PRINTING, KANSAS CITY, MO.

INDEX.

PAGE

Notice. 1
Motion to Dismiss. 3
Brief in Support of Motion. 5

CASES CITED.

Benites v. Hampton, 123 U. S. 519. . . . . 7, 8
Camden v. Stuart, 144 U. S. 104 8
Colorado Marble Co. v. Collins, 230 Fed. 78, 144 C. C. A. 276. 7
Dugger v. Tavloe, 121 U. S. 286. 6
Fitch v. Richardson, 147 Fed. 196, 77 C. C. A. 422. 8
Portland Co. v. United States, 15 Wall 1. 6
Rowe v. Phelps, 152 U. S. 87. 8
Ryan v. Koch, 84 U. S. (17 Wall.) 19. 6
Schooner Catharine v. United States, 11 U. S. (7 Cranch) 99. 6
Stevenson v. Barbour, 140 U. S. 48. 8
School District v. Insurance Co., 101 U. S. 472 6
Wood v. Wilbert Lumber Co., 226 U. S. 384. . 8
Section 997, 1012 R. S. United States. 8

In the

Supreme Court of the United States

October Term, 1923.

No. 70.

JAMES C. DAVIS, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, *Petitioner,*

vs.

GEORGE WECHSLER, *Respondent.*

No. 29012.

NOTICE OF MOTION TO DISMISS.

To James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, Petitioner, and O. H. Dean, H. M. Langworthy, Roy B. Thomson and M. W. Borders, counsel for petitioner:

You and each of you are hereby notified that on Monday, October 22nd, 1923, at the convening of court, or as soon thereafter as counsel can be

heard, the undersigned will present and submit to the Supreme Court of the United States his motion to dismiss the petition in the above entitled cause, and brief in support thereof, a true copy of which motion and brief are hereto attached and made a part hereof.

.....

William J. Hogsett

.....

Mont T. Prewitt

.....

Counsel for Respondent.

Service of the foregoing notice, and of a copy of motion and brief referred to therein, are hereby acknowledged this.....day of September, 1923.

.....

.....

Counsel for Petitioner.

In the Supreme Court of the United States.
October Term, 1923.
No. 70.

James C. Davis, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, Petitioner,

vs. No. 29012.

George Wechsler, Respondent.

RESPONDENT'S MOTION TO DISMISS.

Now comes George Wechsler, respondent in the above cause, and moves the court to dismiss the petition herein for the following reasons, to-wit:

1. Because the petitioner is in default under Rule 21 of this court in having failed to file the brief required by said rule.

2. Because the petitioner has not filed a specification of the errors relied upon by petitioner, as required by paragraph 2 of Rule 21 of this court.

3. Because the petitioner has not made service upon the respondent or his counsel of a copy of brief, as required by paragraph 7 of said Rule 21.

4. And in support of this motion respondent states that the petition for the writ of certiorari was filed herein by petitioner on July 3rd, 1922. That petitioner accompanied said petition with a brief denominated by him "Brief in Support of Petition for Writ of Certiorari." That said brief did not contain any specification of the errors relied upon, as required by Rule 21; and that said brief did not and does not comply with the re-

quirements of said Rule 21. That the writ of certiorari was granted by this court on October 16th, 1922. That thereafter, on November 11th, 1922, return to said writ was duly filed with the clerk of this court. That thereafter, in due time, thirty copies of the record were printed under the clerk's supervision, and copies thereof were distributed and delivered by the clerk to the respective counsel for petitioner and respondent, at a date which is not exactly known to respondent, but which was at least ninety days before the first day of the October Term, 1923. That thereafter this cause was, in the regular course, placed upon the docket of this court for the October Term, 1923, and is numbered 70 thereon; and that according to the present position of the cause upon the docket, the cause will be called for argument on or about October 8th, 1923.

That the petitioner and his counsel have filed no brief for the final hearing, and have filed no other or further brief in this cause except the aforesaid "Brief in Support of Petition for Writ of Certiorari;" and that said brief so filed does not contain any specification of errors.

That therefore petitioner has wholly failed to comply with the requirements of Rule 21.

Wherefore respondent moves the court to dismiss the petition herein.

William A. Hogsett

Mont. T. Reeves

Attorneys for Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO DISMISS.

The facts material to this motion are as follows:

The petition for the writ of certiorari was filed herein on July 3rd, 1922, accompanied by a brief denominated by petitioner "Brief in Support of Petition for Writ of Certiorari." Said brief did not contain any specification of errors, and does not comply, or purport to comply, with the requirements of Rule 21 of this Court. The writ of certiorari was granted October 16th, 1922, and return to the writ was filed herein on November 11th, 1922. In due time thereafter thirty copies of the record were printed under the clerk's supervision, and copies thereof were distributed and delivered to respective counsel for petitioner and respondent, at a date which is not exactly known to respondent, but which was at least ninety days before the first day of the October Term, 1923. The case was in due course placed upon the docket for the October Term, 1923, and will be called for argument probably on or about October 8th, 1923.

Petitioner has filed no other or further brief except the aforesaid "Brief in Support of Petition for Writ of Certiorari;" and that brief so filed does not contain any specification of errors whatever.

I.

The petition should be dismissed for failure of petitioner to file brief.

Rule 21 of this Court.
Schooner Catharine v. *United States,* 11 U. S. (7 Cranch) 99.
Ryan v. *Koch,* 84 U. S. (17 Wall.) 19.
Dugger v. *Tavloe,* 121 U. S. 286.
Portland Co. v. *United States,* 15 Wall. 1.
School District v. *Insurance Co.,* 101 U. S. 472.

The only question is whether Rule 21 requires of a petitioner in a certiorari case the filing of briefs on final hearing.

It is true that on its face Rule 21 appears to apply only to "plaintiff in error or appellant." But if this rule be held not to apply to a petitioner in certiorari cases, then there is no rule whatever requiring briefs to be filed upon final hearing in certiorari cases. Certainly this is not to be supposed.

It is evident from the provisions of Section 3 of paragraph 2 of Rule 21 that petitioner must file brief on final hearing, the same as is required of a plaintiff in error or appellant. For the language of that section requires the brief to contain "a reference to the *pages* of the *record.*" When a petitioner files his petition for the writ of certiorari and his brief in support thereof, of course the record upon which the cause will be finally submitted (if the writ should issue) *has*

not yet been printed at all; and his brief accompanying the petition therefore could not contain the page references required by this section of the rule. Obviously the rule contemplates that petitioner in certiorari cases must file a brief for the final hearing, *after the record is printed by the clerk.*

In this connection, we call attention to the fact that it has been held that when the brief fails to point out the page of the record on which an error appears, the error will not ordinarily be considered.

Colorado Marble Co. v. *Collins*, 230 Fed. 78, 144 C. C. A. 276.
Benites v. *Hampton*, 123 U. S. 519.

II.

The brief in support of petition for writ of certiorari, filed by petitioner, does not contain any specification of errors, and therefore should not be held to be a compliance with the rules.

As we understand the rules, the petitioner must file a new brief upon final hearing in certiorari cases, the same as is required of a plaintiff in error and appellant in cases brought here on writ of error and appeal respectively. The petitioner cannot treat the brief filed with his petition for the writ of certiorari as a compliance with this requirement.

But even if this were not so, nevertheless the brief heretofore filed in this cause by the petitioner

in support of the petition, does not comply with the rules, and is wholly insufficient, because it does not contain any specification of errors, as required by Rule 21.

The net result is that this Court does not now have before it in this cause any specification of errors whatsoever. For this reason, also, the appeal should be dismissed.

Benites v. *Hampton,* 123 U. S. 519.
Rowe v. *Phelps,* 152 U. S. 87.
Stevenson v. *Barbour,* 140 U. S. 48.
Camden v. *Stuart,* 144 U. S. 104.
Wood v. *Wilbert Lumber Co.,* 226 U. S. 384.
Fitch v. *Richardson,* 147 Fed. 196, 77 C. C. A. 422.
Sec. 997, 1012, Revised Statutes United States.

For all the foregoing reasons, we respectfully ask that the petition be dismissed.

Respectfully submitted,

WILLIAM S. HOGSETT,
MURAT BOYLE,
MONT T. PREWITT,
Counsel for Respondent.

FILED
OCT 8 1923
WM. R. STANSBURY
CLERK

No. 29012.

In the Supreme Court of the United States

October Term, 1923.

No. 70.

JAMES C. DAVIS, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, *Petitioner,*

vs.

GEORGE WECHSLER, *Respondent.*

RESPONDENT'S SUPPLEMENTAL BRIEF.

WILLIAM S. HOGSETT,
MURAT BOYLE,
MONT T. PREWITT,
Counsel for Respondent.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

INDEX.

PAGE

Brief. 3

Argument. 10

I. General Order 18a does not relate to jurisdiction of the subject matter of the action, but only to the venue of the action, and was therefore a subject of waiver by the defendant. 10

II. Defendant waived the provisions of General Order 18a by entering his appearance. 19

III. The decision by the Court of Appeals rests on a non-Federal ground broad enough to sustain it, and therefore this Court should not disturb the decision. 32

IV. The present case does not present any question of special importance. 36

V. The motion for new trial filed by petitioner in the trial court did not preserve the venue question for appellate review. 37

VI. The mandate of the Court of Appeals was filed in the trial court more than two months before the petition for certiorari was filed in this court, and the petition should be dismissed because of petitioner's laches. 41

Cases Cited.

PAGE

Alabama & Vicksburg Ry. Co. v. Smith Journey, 42 Sup. Ct. Rep. 6. 10

Beaupre v. Noyes, 138 U. S., l. c. 402. 34

Bilby v. Stewart, 246 U. S. 255. 36

Caldwell v. Payne, Director General, 246 S. W., l. c. 316. 15

PAGE

Central Law Journal, Vol. 88, No. 9, Feb. 28th, 1919. 13

Central Vermont Ry. v. White, 238 U. S., l. c. 513..... 35

Consolidated Turnpike Co. v. Railway Co., 228 U. S. 596, l. c. 599..... 36

Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300..... 36

Enterprise Irrigation District v. Canal Co., 243 U. S. 157..... 36

Eustis v. Bolles, 150 U. S., l. c. 369..... 33

Farrar & Brown v. United States, 3 Pet. 459 26

Federal Control Act of March 21, 1918, Section 10. 23

Howat v. State of Kansas, 42 Sup. Ct. Rep., l. c. 279. 36

In Re The F. J. Luckenbach, 267 Fed. 931.. 30

John v. Paullin, 231 U. S., l. c. 585..... 35

Johnston v. Stimmel, 89 N. Y. 117 (affirming 26 Hun. 435)..... 30

Kansas City Star Co. v. Julian, 215 U. S. 589. 32

Lee v. Chesapeake & Ohio R. R. Co., 43 Sup. Ct. Rep., l. c. 231.....17, 20

Magnum Import Co. v. DeSpoturno Coty, Adv. Opinions 1922-1923, l. c. 588.....36, 43

Maplegreen Co. v. Trust Co., 237 Mo., l. c. 362-363. 39

Mellon v. McCafferty, 239 U. S. 134..... 36

Missouri Pacific Railroad Co. v. Ault, 256 U. S. 554. 11

Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation, 258 U. S., l. c. 566-567.... 27

PAGE

Sonken & Galamba Iron & Metal Co. v. Hines, Director General, 238 S. W., l. c. 138. . . . . 17. 20, 29

State ex rel. Berkshire v. Ellison, 230 S. W., l. c. 972-3. . . . . 42, 44

State ex rel. v. Woods, 234 Mo., l. c. 25. . . . 40

United States v. New York & Oriental Steamship Co., 216 Fed. 61. . . 15, 19, 20, 21, 28

Washington v. Miller, 235 U. S., l. c. 429. . 35

Western Loan & Savings Co. v. Mining Co., 210 U. S. 368. . . . . 19, 21

In the Supreme Court of the United States

October Term, 1923.

No. 70.

JAMES C. DAVIS, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, *Petitioner,*

vs.

GEORGE WECHSLER, *Respondent.*

No. 29012.

RESPONDENT'S SUPPLEMENTAL BRIEF.

Respondent has heretofore filed a motion to dismiss, based upon petitioner's failure to file brief and specification of errors as required by Rule 21. Since being served with notice and copy of such motion the petitioner has served respondent with a supplemental brief. This second brief was served upon respondent on Sept. 29th, 1923, which is only

nine days before the day this cause will probably be called for argument. Petitioner is therefore still in default under Rule 21.

Without waiving, but expressly reserving, his rights in the premises, based upon the petitioner's violation of the rules of this Court, the respondent respectfully submits the following as a supplement to the statement, brief and argument heretofore filed by the respondent.

BRIEF.

I.

General Order 18a does not relate to jurisdiction of the subject matter of the action, but only to the venue of the action, and is therefore a subject of waiver by the defendant.

Alabama & Vicksburg Ry. Co. v. *Smith Journey,* 42 Sup. Ct. Rep. 6.
Missouri Pacific Railroad Company v. *Ault,* 256 U. S. 554.
Caldwell v *Payne, D. G.,* 246 S. W., l. c. 316.
United States v. *New York & Oriental Steamship Co.,* 216 Fed. 61.
Lee v. *Chesapeake & Ohio R. R. Co.,* 43 Sup. Ct. Rep., l. c. 231.
Sonken & Galamba Iron & Metal Co. v. *Hines, D. G.,* 238 S. W., l. c. 138.

II.

The defendant in the court below waived the provisions of General Order 18a by his general entry of appearance in the trial court.

The record shows that the defendant Director General entered a general appearance in the trial court on three different occasions: first, by filing a motion to strike out an amendment to the petition (Trans., p. 6); again by filing an answer containing a plea to the merits coupled with a plea

to the venue (Trans., p. 7), and again upon the substitution of Payne for Hines, by expressly entering his appearance and adopting Hines' answer (Trans., p. 8).

Western Loan & Savings Co. v. *Mining Co.*, 210 U. S. 368.
United States v. *Steamship Co.*, 216 Fed. (C. C. A.) 69.

The substituted Director General, Payne, could have refused to enter his appearance and could have stood upon his rights under General Order 18a, and in such event could only have been brought into court by summons in the regular way; but he did not see fit to do this, and voluntarily entered his appearance. He thereby waived his immunity from suit in that venue.

United States v. *New York & Oriental Steamship Co.*, 216 Fed. (C. C. A.), l. c. 69.
Lee v. *Chesapeake & Ohio Railway Co.*, 43 Sup. Ct. Rep., l. c. 231.
Sonken & Galamba Iron & Metal Co. v. *Hines, D. G.*, 238 S. W., l. c. 138.

The fact that petitioner after entering his appearance adopted the answer of his predecessor containing a plea to the venue, did not prevent the appearance from being general.

Western Loan & Savings Co. v. *Mining Co.*, 210 U. S. 368.
United States v. *Steamship Co.*, 216 Fed., l. c. 69.

The Director General had the authority to enter a general appearance and waive the objection to venue.

Farrar & Brown v. *United States,* 3 Pet. 459.
United States v. *New York & Oriental Steamship Co.,* 216 Fed. (C. C. A.) 69.
Sloan Shipyards Corporation v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S., l. c. 566-567.
Sonken-Galamba Iron & Metal Co. v. *Hines, D. G.,* 238 S. W., l. c. 138.
Johnston v. *Stimmel,* 89 N. Y. 117 (affirming 26 Hun. 435).
In Re The F. J. Luckenbach, 267 Fed. 931.

The right to sue the Director General was expressly granted by Congress.

Sec. 10, Federal Control Act of March 21, 1918.

The grant by Congress of the right to sue the Director General was not made conditional upon suit being brought in any certain venue; on the contrary the grant was unqualified in this respect.

If the Director General had the authority under the Federal Control Act to make General Order 18a, then certainly he had the power to revoke it or to waive its provisions in any given case if he deemed it to his advantage to do so.

United States vs. Kolen 226 Fed. (C.C.A.)
l.c. 15

III.

The decision by the Court of Appeals rests on a non-Federal ground broad enough to sustain it, and therefore this Court should not disturb the decision.

A case which turns on a question of waiver presents no Federal question.

Kansas City Star Co. v. *Julian,* 215 U. S. 589.
Eustis v. *Bolles,* 150 U. S., l. c. 369.
Beaupre v. *Noyes,* 138 U. S., l. c. 402.

The decision that defendant waived the venue by entering his appearance is a decision of a non-Federal question, even though the venue was prescribed by Federal authority.

John v. *Paullin,* 231 U. S., l. c. 585.

The Court of Appeals simply decided a question of local practice, and this Court will not review decisions of state courts involving only questions of local practice.

Washington v. *Miller,* 235 U. S., l. c. 429.
Central Vermont Ry. v. *White,* 238 U. S., l. c. 513.

This Court will refuse to review decisions of state courts based on non-Federal grounds broad enough to sustain them.

Bilby v. *Stewart,* 246 U. S. 255.
Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300.

Kansas City Star Co. v. *Julian,* 215 U. S. 589.
Enterprise Irrigation District v. *Canal Co.,* 243 U. S. 157.
Consolidated Turnpike Co. v. *Railway Co.,* 228 U. S. 596, l. c. 599.
Mellon v. *McCafferty,* 239 U. S. 134.
Howat v. *State of Kansas,* 42 Sup. Ct., Rep., l. c. 279.

IV.

The present case does not present any question of special importance.

Magnum Import Co. v. *DeSpoturno Coty,* Adv. Opinions 1922-23, l. c. 588.

V.

The motion for new trial filed by petitioner in the trial court did not preserve the venue question for appellate review.

If the judgment were reversed and the cause remanded to the Court of Appeals, that court would be precluded, under controlling decisions of the Supreme Court of Missouri, from upholding petitioner's contention on the venue question, because petitioner failed in his motion for new trial to preserve the point for appellate review.

Maplegreen Co. v. *Trust Co.,* 237 Mo., l. c. 362-363.
State ex rel. v. *Woods,* 234 Mo., l. c. 25.

It is true that when the case was pending in the Court of Appeals before, that court chose, as a matter of grace rather than as a matter of right, to review the venue question on its merits; but before the Court of Appeals could decide the question favorably to the petitioner, it must be assumed that that court would follow the above controlling decisions of the Supreme Court, and hold that the point was not presented for review.

While this is a matter of state practice, yet it is material here, for if the cause were remanded to the state court, the petitioner would gain nothing, not having preserved the venue question properly for review by the state Court of Appeals.

VI.

The mandate of the Court of Appeals was filed in the trial court more than two months before the petition for certiorari was filed in this Court, and the petition should be dismissed because of petitioner's laches.

Petitioner is asking this Court to review a judgment which petitioner by his own laches has allowed to become final, so far as the Court of Appeals and the trial court are concerned, the Court of Appeals having lost jurisdiction of the cause when the mandate went down and was filed in the trial court.

Petitioner could have applied to the Court of Appeals for an order withholding the mandate.

State ex rel. Berkshire v. *Ellison*, 230 S. W., l. c. 972.

Magnum Import Co. v. *DeSpoturno Coty,* Adv. Opinions 1922-23, l. c. 588.

Petitioner should be barred by his own laches from obtaining the review he seeks.

State ex rel. Berkshire v. *Ellison,* 230 S. W., l. c. 972-973.

ARGUMENT.

I.

General Order 18a does not relate to jurisdiction of the subject matter of the action, but only to the venue of the action, and was therefore a subject of waiver by the defendant.

As pointed out in our original brief, this Court in the case of *Alabama & Vicksburg Ry. Co.* v. *Journey*, 42 Sup. Ct. Rep. 6, upheld General Order 18a as an order fixing venue, saying:

> "It was within the powers of the Director General to prescribe the *venue* of suits; and the facts set forth in the order show both the occasion for it and that the *venue* prescribed was reasonable." (Italics ours.)

There has always been a broad and well defined distinction in law between statutes fixing venue and statutes conferring or withholding jurisdiction of the subject matter of suits, and the above language was of course used by this Court advisedly and with the fullest appreciation of that distinction. The petitioner now asks this Court, in effect, to overrule what it has held in the Journey case and to declare that General Order 18a is an order relating to jurisdiction over the *subject matter* instead of an order fixing *venue*.

We respectfully submit that in the light of the provisions of the Federal Control Act, and par-

ticularly Section 10 thereof, and of the decision of this Court in *Missouri Pacific Railroad Company* v. *Ault,* 256 U. S. 554, General Order 18a can be upheld only as a *venue* order, and that it was not within the power of the Director General to promulgate an order affecting jurisdiction of the *subject matter* of actions such as the one at bar. In the Ault case, *supra,* referring to Section 10 of the Federal Control Act this Court said:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of Federal operation. * * * The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control. * * * Thus under paragraph 10 if the cause of action arose prior to Government control, suit might be instituted or continued to judg-

> ment against the company as though there had been no taking over by the Government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest *as by fixing the venue*, or the time for trial. If the cause of action arose while the Government was operating the system the 'carrier while under Federal control' was nevertheless to be liable and sueable. * * * The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law, etc. * * * Wherever the law permitted compensatory damages they may be collected against the carrier while under Federal control."

We respectfully call to the Court's attention the fact that up until the time of the decision of this Court in the Journey case it had been held by numerous courts of respectable authority that General Order 18a could not be upheld on any theory, even as a venue order. Such decisions were based upon the ground that by Section 10 of the Federal Control Act it was provided without qualification that "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law.*" And it was quite generally thought that the preceding sentence in Section 10, "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be incon-

sistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President," placed no limitation whatever upon the right given by the Act to sue the carriers in cases such as the one at bar. We have cited a great number of these cases at page 27 of our original brief. In addition to those cases we call attention to an article in the Central Law Journal, Vol. 88, No. 9, February 28th, 1919, by Mr. Edgar Watkins, author of Watkins on Shippers and Carriers, where he said:

> "The phrase, 'except in so far as may be inconsistent * * * with any order of the President,' contained in Section 10, copied *supra,* from the Act of March 21, limits only the sentence referring to the 'liabilities' of the carriers and is the only language that could be construed as giving the President any power to issue orders limiting rights granted or retained by the Act. At the time of the passage of this Act there were statutory 'liabilities' of the carriers requiring an interchange of traffic, prohibiting pooling freights, compelling the filing of tariffs and fixing rules for the establishment of through routes. Those statutory provisions were such as likely to hamper the purpose of unification of the transportation systems; and there was, therefore, necessity for power in the executive, when the facts demanded, to make orders suspending the 'liabilities' created by such statutes. This power granted the President is valid, as it is legal to give an administrative agency the function of determining when the facts come under a rule prescribed by the Legislative Department.

> There is no exception in the next sentence, and actions and suits may be brought 'against' the 'carriers,' 'as now provided by law,' and notwithstanding 'the carrier is an instrumentality or agency of the Federal Government.' No power is given anyone to limit this right or to deprive suitors thereof."

With great respect we earnestly submit that this Court has gone to the uttermost limit of the Federal Control Act in upholding General Order 18a, even as a *venue* order. For in view of the provision of Section 10 that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law,*" and in view of the fact that by existing law suits could be brought against a carrier *in any county where it had an agent*, there is certainly strong support for the argument that the general order was in direct conflict with that provision of the Federal Control Act.

But if the Court should now go still further and construe the order as one withdrawing jurisdiction of the *subject matter* from the Circuit Court of Jackson County, Missouri, in cases like this one, then this would be tantamount to saying that the Director General had it in his power to completely nullify all of the provisions of Section 10 of the Federal Control Act. For if the Director General by this order could withdraw jurisdiction of the subject matter of such cases from one court, then he might by the same token withdraw such jurisdiction from all courts and make it impossible for

any action arising under Federal control to be enforced against the carrier.

It is evident that the order can be sustained only, if at all, as a *venue* measure, and not as a regulation controlling jurisdiction of the *subject matter.*

The Supreme Court of Missouri has recently construed General Order 18a as a venue measure in the late case of *Caldwell* v. *Payne, Director General,* 246 S. W., l. c. 316.

In our original brief we have cited a large number of decisions by this Court to the effect that the immunity of a defendant from suit in a given venue is in the nature of a personal exemption or privilege, *which defendant may waive.* Other decisions in addition to those cited in our original brief, to the same effect, are as follows:

In the case of *United States* v. *New York & Oriental Steamship Co.,* 216 Fed. 61, the Circuit Court of Appeals for the Second Circuit had for consideration a suit brought against the United States in the wrong district. The law officers of the Government entered a general appearance, but immediately filed a demurrer charging that the court did not have jurisdiction of the subject of the action, *the ground of the demurrer being that the Tucker Act required the suit to be brought only in the district where plaintiff resided, and that the suit was not so brought.* This situation, according to the contention of the Government, deprived the court of jurisdiction of the *subject matter*—the identical contention made by the petitioner in the case at bar. After a review of the

authorities, the Circuit Court of Appeals held (l. c. 69):

> "It seems to us clear that the general intent of the Tucker Act is to open the courts of the United States to suits against the Government as respects the claims specified in that Act, and that the intention was that they should be open to aliens as well as to citizens. And it may be that the provision which requires suits to be brought in the district where the plaintiff resides is applicable only to aliens and citizens residing in the United States, and that persons residing outside the United States may bring suit in any district. But we do not find it necessary to express any opinion upon that question. In our opinion, if the provision which requires the plaintiff to bring suit in the district in which he resides is applicable to nonresident aliens and to citizens residing abroad, *nevertheless the requirement is a personal privilege which the law officers of the Government may waive and in this case did waive by putting in a general appearance.* In *Farrar & Brown* v. *United States*, 3 Pet. 459, 7 L. Ed. 741, Chief Justice Marshall held that the Attorney General of the United States *by a general appearance cured any defect in the service of process on the United States, and that the general rule that such an appearance cured a defect in process was applicable to the United States as well as to any private litigant.*"

We call the attention of the Court to the fact that in the case just cited the same situation existed as in the case at bar, namely, the defendant en-

tered a general appearance, and thereafter immediately challenged the jurisdiction of the court over the subject matter on the ground that the suit was brought in the wrong venue. We respectfully submit that the case is directly in point.

And in the late case of *Lee* v. *Chesapeake & Ohio Railway Co.*, 43 Sup. Ct. Rep., l. c. 231, this Court, as recently as January, 1923, has again held that Section 51 of the Code relating to the venue of suits brought in District Courts:

> "does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, *but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election,* and does waive if, when sued in some other district, he enters an appearance without claiming his privilege."

In the case of *Sonken-Galamba Iron & Metal Co.* v. *Hines, Director General,* 238 S. W., l. c. 138, the Kansas City Court of Appeals said:

> "The Director General operating the Erie Railroad entered his appearance in the cause by filing his answer, a motion to elect, giving notice to take deposition, and after verdict and judgment was entered solely against him as operator of the Erie Railroad, he filed a motion for a new trial and application for an appeal. We think, under such circumstances, there is no question but that defendant entered his general appearance. *Brown* v. *British Dominion General Insurance Co.*, (Mo. App.) 228 S. W. 884; *Roberts* v. *American National Assur. Co.*, 201 Mo. App. 239, 212

S. W. 390; *Bush* v. *Block*, 193 Mo. 704, 187 S. W. 153. *We see no reason why the Director General could not enter his general appearance in a case of this kind, as well as any ordinary defendant. Seaver* v. *Hines*, (D. C.) 261 Fed. 239, 240."

In the light of the foregoing decisions and of the great number of decisions cited in our original brief, we see no escape from the proposition that General Order 18a had no greater or other effect that to prescribe venue; and that the privilege which the Director General enjoyed of being sued in the particular venue prescribed by that order was an exemption or immunity which he could waive by his general appearance.

Petitioner in his brief calls attention to the fact that our reply to defendant's answer pleaded the invalidity of General Order 18a. That is quite true. At the time the reply was filed, the Smith Journey case had not been decided, and General Order 18a had been held by many courts to be in conflict with the Act of Congress of March 21, 1918, and therefore invalid. (See cases cited at page 27 of our original brief.)

But the petitioner cannot consistently criticise respondent for having raised the invalidity of General Order 18a. For we note that in the case of *McGrath* v. *Payne, Director General*, 245 S. W. 1061 (a case growing out of the same wreck in which respondent was injured), the Director General *did not plead* General Order 18a, or raise the venue question in any way. And this, too, in spite

of the fact that if the order had been then deemed valid by the Director General it could have been properly pleaded; for the action in that case was not brought in the county of plaintiff's residence or in the county where the cause of action accrued. It is therefore apparent that prior to the opinion in the Smith Journey case upholding General Order 18a, learned counsel for the Director General himself believed the order to be invalid. (We may add that after the decision of the Smith Journey case the appellant in the McGrath case undertook to raise the point by a motion for a rehearing in the Supreme Court of Missouri; but since the point was not raised in the trial court, it was not noticed.)

II.

The defendant in the trial court waived the provisions of General Order 18a by his general entry of appearance in the trial court.

The record shows that on ~~three~~ four different occasions the defendant Director General entered a general appearance in this cause: First, by filing a motion to strike out an amendment to the petition, his said motion not in any way raising any question of venue and not limiting his appearance as special (Trans., p. 6); ~~second~~ third, by filing an answer containing a plea to the merits coupled with a plea to the venue (Trans., p. 7), which was equivalent to a general appearance (*Western Loan & Savings Co.* v. *Mining Co.*, 210 U. S. 368; *United States* v.

Steamship Company, 216 Fed., l. c. 69; and [illegible], upon the substitution of Payne for Hines, by *expressly* entering his appearance and adopting Hines' answer (Trans., p. 8).

As pointed out by the Court of Appeals in its opinion in this case, in discussing the last entry of appearance, the defendant John Barton Payne could have refused to enter his appearance and could have stood upon his rights under General Order 18a. In such event, he could only have been brought into court by means of a summons served upon him in the usual and ordinary way. But he did not see fit to do this. He *voluntarily* entered his appearance. His conduct was dictated by *his own volition* solely. It seems almost self-evident that such conduct on defendant's part was a waiver of the immunity from suit in that venue.

In our original brief we have cited a great many cases decided by this Court upholding the proposition that the general entry of appearance by the petitioner was a waiver of the venue question. Other authorities to the same effect are as follows:

United States v. *New York & Oriental Steamship Co.*, 216 Fed. (C. C. A.), l. c. 69.

Lee v. *Chesapeake & Ohio R. R. Co.*, 43 Sup. Ct. Rep., l. c. 231.

Sonken-Galamba Iron & Metal Co. v. *Hines, Dir. Gen.*, 238 S. W., l. c. 138.

The petitioner in his brief lays great stress upon the fact that, after entering his appearance, he

adopted the answer theretofore filed by his predecessor, containing a plea to the venue coupled with a plea to the merits. This did not prevent the appearance from being general. In *Western Loan & Savings Co.* v. *Mining Co.*, 210 U. S. 368, this Court held that the filing by defendant of a demurrer going to the *merits* as well as to the *jurisdiction*, is a waiver of the objection that the suit was brought in the wrong venue. Identically the same principle is announced in *United States* v. *New York & Oriental Steamship Co.*, 216 Fed. (C. C. A.), l. c. 69.

It may be urged by the petitioner that the mere change in the person of the Director General from Walker D. Hines to John Barton Payne did not constitute a change in the identity of the defendant, and that the entry of appearance by John Barton Payne did not change the situation because Walker D. Hines was already in court. But the answer to this is plain: (1) The record shows that John Barton Payne "entered his appearance in said cause" (Trans., p. 8); and this affirmative, overt act by the defendant, in entering his appearance, was as much a waiver of the venue question as if the original defendant Walker D. Hines had on that day again "entered his appearance in said cause." (2) Furthermore, Walker D. Hines had previously entered his appearance on ~~two~~ three different occasions, first, by appearing generally and filing his motion to strike out an amendment of the petition (Trans., p. 6), this being prior to any objection to the venue; and thereafter by filing an answer containing a plea to the merits coupled

with a plea to the venue (Trans., p. 7). This was a general appearance by Hines (*Western Loan & Savings Co.* v. *Mining Co.,* 210 U. S. 368; *U. S.* v. *Steamship Co.,* 216 Fed. [C. C. A.], l. c. 69). So that it makes no difference whether the change in the person of the Director General be disregarded as immaterial. The fact remains that *on three different occasions* the defendant Director General entered a general appearance in the cause (Trans., pp. 6, 7, 8).

The petitioner makes frequent reference throughout his brief to the fact that he did not "intend" by entering his appearance to waive the venue. It is not a question of what he now says he intended. *He is conclusively presumed to intend the legal consequences of his acts.* The necessary legal consequence of a general entry of appearance is to waive all objections to the venue. The petitioner is conclusively presumed to have intended that result when he entered his general appearance.

For the first time in the history of this case the petitioner now raises the point that the Director General had no authority to waive the exemption from suit in this case in Jackson County. This point was not raised in the Court of Appeals, or in the Supreme Court of Missouri, or in the original brief filed by the petitioner in this Court. It is raised for the first time in petitioner's belated supplemental brief. The contention has all the ear marks of an eleventh hour after-thought.

As we understand petitioner's argument of this point, it is founded upon the following proposi-

tions: (1) A suit against the Director General is a suit against the United States. (2) The United States cannot be sued without its consent. (3) Statutes granting the right to sue the United States must be strictly construed. (4) The Director General could not enlarge the rights given by Congress to sue the United States.

From these four propositions he attempts to draw the conclusion that if respondent did not have the right under the law to institute this suit in Jackson County (instead of Andrew County), then the Director General had no authority to grant that right by entering his appearance in Jackson County.

We do not dispute the premises, but we do dispute the conclusion which petitioner draws therefrom. We concede that a suit against the Director General is a suit against the United States; that the United States cannot be sued without its consent; that statutes granting the right to sue the United States are to be strictly construed; and that the Director General could not enlarge the rights given by Congress *to sue the United States.*

But the petitioner completely ignores the important fact that *the United States did grant to the respondent the right to sue the Director General.* This was granted by the Federal Control Act of March 21, 1918. The material parts of Section 10 of the Federal Control Act are as follows:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State

> or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. * * * But no process, mesne or final, shall be levied against any property under such Federal control."

This language is as plain as language can be made. It expressly granted the right to bring suits against the Director General. And no matter what rules of strict construction petitioner may seek to apply, this right so plainly and unequivocally granted cannot be whittled or pared away.

Furthermore, the grant was not made by Congress conditional upon suit being brought in any certain venue. On the contrary, the grant was unqualified in this respect, the act providing that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law.*" It was not Congress who limited the venue of suits against the Director General. It was the Director General himself who did that, by General Order 18a.

It seems almost self-evident that the Director General who made and promulgated General Order 18a, necessarily had the authority to revoke it entirely, or to waive it in any given case

if he saw fit to do so. For, if he had the authority under the Federal Control Act to *make* the order (and the Smith Journey case holds that he had), then certainly he had the power to revoke it or *waive* its provisions in any given case if he saw fit. The sound reason of this proposition seems apparent. United States v. Kolenc 226 Fed (C.C.A.

Suppose, for the sake of argument, that in this particular case the Director General had deemed it more convenient to himself and to his witnesses, and therefore to his own advantage, to try this case at Kansas City in Jackson County, rather than in the rural, out-of-the-way county seat of Andrew County, Missouri. And suppose that plaintiff, by the *express consent* of the Director General, had brought the suit in Jackson County, although according to General Order 18a the proper venue lay only in Andrew County. Would the Director General in such case now be heard to say to this Court: "Although I *expressly agreed* to be sued in Jackson County, and entered my *general appearance* there, and tried the case on its merits there, yet I repudiate the judgment as void, because I had no authority to waive the general order which I myself made?" We confidently assert that the petitioner could never successfully maintain that contention before this Honorable Court.

And yet his present position differs not at all, in principle, from that. Petitioner is bound to concede that Congress gave respondent the right to sue him. He must further concede (for the record so shows) that on three different occasions

he entered his general appearance in the suit filed in Jackson County (Trans., pp. 6, 7, 8). And he can hardly deny the principle that a *general appearance is equivalent to an express waiver* of the objection that a suit is brought in the wrong venue. Yet in spite of all this, the petitioner (perhaps realizing that he cannot prevail upon the proposition that General Order 18a relates to jurisdiction of the subject matter, and that a general appearance would therefore not be a waiver) now makes the belated contention that he had no authority to enter his general appearance. We earnestly submit that the petitioner should not be permitted to successfully repudiate his authority.

This Court at an early day passed upon the authority of the Attorney General of the United States to waive defects in the service of process upon the United States by entering a general appearance. In the case of *Farrar & Brown* v. *United States,* 3 Pet. 459, Chief Justice Marshall said:

> "The practice has uniformly been, ever since the seat of government was removed to Washington, for the clerk to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the attorney-general in every case to which the United States are a party, by entering his name on the docket. This practice must have been known to every attorney-general, and has never been objected to. It might be considered, therefore, as having an implied acquiescence on the part of the attorney-general, although it is admitted that there is

no evidence of any express assent. We do not say that this practice would be conclusive against the attorney-general, if he should at the first term withdraw such appearance, or move to strike it out, in order to take advantage of any irregularity in the service of process. But if he lets it pass for that term, without objection, we think it is conclusive upon him as to an appearance.

The decisions of this court have uniformly been that an appearance cures any defect in the service of process; *and there is nothing to distinguish this case from the general doctrine.*"

In the case of *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549, the Fleet Corporation made the contention that it was immune from suit because it was an agency of the government. This Court recently disposed of that contention in the following language (l. c. 566-567):

"These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. *But the general rule is that any person within the jurisdiction always is amenable to the law.* If he is sued for conduct

> harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. *Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court.* An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v. *Bank of United States,* 9 Wheat. 738, 842, 843; *United States* v. *Lee,* 106 U. S. 196, 213, 221." (Italics ours.)

The inference, plainly to be drawn from the words which we have italicized, is that if the powers of the Fleet Corporation had been given to a single man, he would stand on exactly the same plane, so far as responding to an action in court is concerned, as any other litigant. And, since any other litigant can, by entering a general appearance, waive an objection to venue, the conclusion necessarily follows that the Fleet Corporation or the Director General could do so.

In the case of *United States* v. *Oriental Steamship Company,* 216 Fed. 69, the Circuit Court of Appeals for the 2nd Circuit held:

> "In our opinion if the provision which requires the plaintiff to bring suit in the district in which he resides is applicable to nonresident aliens and to citizens residing abroad, nevertheless the requirement is a personal

> privilege *which the law officers of the government may waive and in this case did waive by putting in a general appearance.* In *Farrar & Brown* v. *United States,* 3 Pet. 459, 7 L. Ed. 741, Chief Justice Marshall held that the Attorney General of the United States by a general appearance cured any defect in the service of process on the United States, *and that the general rule that such an appearance cured a defect in process was applicable to the United States as well as to any private litigant."*

We call attention to the fact that in that case the venue was prescribed by an Act of Congress, not by the departmental order of a government official; yet it was held that the law officers of the government could waive the objection that the suit was brought in the wrong venue. That case is directly in point here. For certainly if an officer of the government could waive objection to venue fixed by statute, he could waive it if fixed by his own order.

And in *Sonken-Galamba Iron & Metal Co.* v. *Hines, Director General,* 238 S. W., l. c. 138, it was held:

> "The Director General operating the Erie Railroad entered his appearance in the cause by filing his answer, a motion to elect, giving notice to take deposition, and after verdict and judgment was entered solely against him as operator of the Erie Railroad, he filed a motion for a new trial and application for an appeal. We think, under such circumstances, there is no question but that defendant en-

tered his general appearance. *Brown* v. *British Dominion General Insurance Co.*, (Mo. App.) 228 S. W. 884; *Roberts* v. *American National Assur. Co.*, 201 Mo. App. 239, 212, S. W. 390; *Bush* v. *Block*, 193 Mo. 704, 187 S. W. 153. *We see no reason why the Director General could not enter his general appearance in a case of this kind, as well as any ordinary defendant. Seaver* v. *Hines*, (D. C.) 261 Fed. 239, 240."

In the case of *Johnston* v. *Stimmel*, 89 N. Y. 117, (affirming 26 Hun. 435) it was held that the United States by voluntarily appearing in a state court as claimant of a fund therein, subjects itself to the jurisdiction of the court, although otherwise the state court could acquire no jurisdiction over it.

In Re The F. J. Luckenbach, 267 Fed. 931, it was held that the United States fully submitted itself to the jurisdiction of the court by filing a bond to prevent a stay of proceedings in the cause.

We respectfully submit that the rule announced in these cases should apply here; and that it should be held that the petitioner had the authority to enter his general appearance, and thereby waive objection to the venue.

The authorities cited by petitioner do not conflict at all with this conclusion. In *United States ex rel. Texas Portland Cement Co.* v. *McCoy*, 233 U. S. 157, the parties who brought the suit upon the contractor's bond had no right to sue within six months, because within that time the right to sue was in the United States exclusively.

Obviously that case does not even remotely approach the question in this case. In *Carr* v. *United States*, 98 U. S. 433, it was held that consent by the United States to be sued must be evidenced by an Act of Congress, and that government officers cannot waive the privilege of the United States *in this respect*. That of course, is true; but the consent of the United States to permit this suit to be brought against the Director General *was evidenced* by the express terms of the Federal Control Act, quoted *supra*. And it is not a question here of the Director General waiving the immunity of the United States from *suit* (for the right to be sued was already granted by Congress), but the question here is whether the Director General waived the right to be sued *only in a certain county*. The decision in the case of *Stanley* v. *Schwalby*, 162 U. S. 255, and the rule quoted from 29 Cyc. 776, by petitioner, are distinguishable on this same ground. The effect of the decision in *Goldsmith* v. *Revenue Cutter*, 6 Ore. 250, is not correctly stated by petitioner. That case only holds that by entering a general appearance and pleading to the merits, the United States government does not waive its *immunity from suit, in a case where Congress had never given the right to sue.*

We respectfully submit that the petitioner had the authority to enter a general appearance and waive all objection to the venue, and that the record in this case shows that he did so.

III.

The decision by the Court of Appeals rests on a non-Federal ground broad enough to sustain it, and therefore this Court should not disturb the decision.

The only proposition decided by the Court of Appeals, of which the petitioner is complaining, is that the defendant voluntarily entered a general appearance in the cause and thereby waived his objection to the venue.

Whether defendant's conduct constituted a waiver was clearly a non-Federal question. This Court has held that a case which turns on a question of *waiver* presents no Federal question for review.

In the case of *Kansas City Star Co.* v. *Julian,* 215 U. S. 589, the defendant company objected to the venue in which the suit was brought and alleged that a statute authorizing suit to be brought in that venue was in violation of the Federal Constitution. The Missouri Supreme Court held (209 Mo. 37) that by filing an application for change of venue the defendant *had entered a general appearance and thereby waived the objection to the venue.* Thereupon defendant sued out a writ of error from this Court to review the decision of the Missouri Supreme Court. This Court disposed of the case in the following *per curiam* opinion:

> *"Per Curiam.* Writ of error dismissed for want of jurisdiction. *Sayward* v. *Denny,* 158 U. S. 180; *Mutual Life Ins. Co.* v. *McGrew,*

188 U. S. 291, 307, 308; *State* v. *Bland*, 186 Missouri 691, 701; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 653; case below, 209 Missouri 35.

The attention of the state Supreme Court was not called to any Federal question until in the petition for rehearing, and that was too late. *Loeber* v. *Schroeder*, 149 U. S. 580, 585, and cases.

"The judgment rested on non-Federal grounds broad enough to sustain it. 209 Missouri 35; *Cincinnati Street Ry. Co.* v. *Snell*, 193 U. S. 30; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322."

We submit the Julian case cannot be distinguished from this case. In each case the defendant was objecting to the venue. In each case the defendant entered a general appearance. In each case the state court held that the general appearance waived the objection to the venue. In the Julian case this Court held that the decision by the state court rested on a non-Federal ground broad enough to sustain it. In this case we respectfully submit that the same result should follow.

In the case of *Eustis* v. *Bolles*, 150 U. S., l. c. 369, the plaintiff in the trial court contended that a statute of Massachusetts had the effect to impair the obligation of a contract and was therefore unconstitutional. The Supreme Judicial Court of Massachusetts disposed of the case, however, on the ground of a *waiver* by the plaintiff. The plaintiff sued out a writ of error from this Court to review the decision. In dealing with the juris-

diction of this Court to review the decision, it was held (l. c. 369):

> "But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a *waiver, the court below did not decide a Federal question.* Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question."

In *Beaupre* v. *Noyes,* 138 U. S., l. c. 402, the case involved a Federal question, and also a question of waiver. This Court disposed of the case in the following language:

> "Whether the state court so interpreted the territorial statute as to deny such right to the plaintiffs in error, we need not inquire, for it proceeded, in part, upon another and distinct ground, not involving any Federal question, and sufficient, in itself, to maintain the judgment, without reference to that question. That ground is, that there was evidence tending to show that the defendants acquiesced in and assented to all that was done, and *waived* any irregularity in the mode in which the assignee conducted the business; and that the question whether the defendants so acquiesced and assented with knowledge of all the facts and thereby *waived* their right to treat the assignment as fraudulent, was properly submitted to the jury. The state court evidently intended to hold that, even if the assignment was originally fraudulent, as

against the creditors, by reason of Young remaining in the store as clerk for Winchester, and assisting the latter in carrying on the business, it was competent for the plaintiffs in error to *waive* the fraud and treat the assignment as valid for all the purposes specified in it. *That view does not involve a Federal question. Whether sound or not, we do not inquire.* It is broad enough, in itself, to support the final judgment, without reference to the Federal question, and for that reason the judgment must be affirmed."

It seems clear, therefore, that the question of what constitutes *waiver* is a purely non-Federal question.

The mere fact that the venue in this case was prescribed by Federal authority does not alter the fact that the Court of Appeals' decision (to the effect that the venue was waived) was nothing more or less than the decision of a purely state question. The decision that defendant *waived* the venue by entering his appearance is a decision of a non-Federal question, *even though the venue was prescribed by Federal authority.*

John v. *Paullin*, 231 U. S., l. c. 585.

The Court of Appeals simply decided a question of local practice, nothing more. It is uniformly held that this Court will not review decisions of state courts involving only questions of state practice.

Washington v. *Miller*, 235 U. S., l. c. 429.
Central Vermont Ry. v. *White*, 238 U. S., l. c. 513.

And of course this Court has consistently refused to review decisions of state courts based on non-Federal grounds broad enough to sustain them.

Bilby v. *Stewart,* 246 U. S. 255.
Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300.
Kansas City Star Co. v. *Julian,* 215 U. S. 589.
Enterprise Irrigation District v. *Canal Co.,* 243 U. S. 157.
Consolidated Turnpike Co. v. *Railway Co.,* 228 U. S. 596, l. c. 599.
Mellon v. *McCafferty,* 239 U. S. 134.
Howat v. *State of Kansas,* 42 Sup. Ct. Rep., l. c. 279.

IV.

The present case does not present any question of special importance.

In our original brief we have cited cases decided by this Court holding that the writ of certiorari should only be issued in case some special ground is shown presenting a question of gravity and general importance. Since that brief was written, this Court has handed down the opinion in the case of *Magnum Import Co.* v. *DeSpoturno Coty,* Advance Opinions 1922-23, l. c. 588, where this Court said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up

> cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. * * * These remarks, of course, apply also to applications for certiorari to review judgments and decrees of the highest courts of states."

General Order 18a, which was a war measure, has long since been superseded by the Transportation Act, providing that suits against the Federal Agent "can be brought in any court which, but for Federal control, would have had jurisdiction of the cause of action had it arisen against such carrier." The number of cases involving the venue question presented here is probably negligible.

We respectfully submit that the petitioner has presented no case of gravity or general importance, and that the petition should be dismissed.

V.

The motion for new trial filed by petitioner in the trial court did not preserve the venue question for appellate review.

The answer filed by defendant in the trial court pleaded General Order 18a, and alleged that the

suit was not brought in the proper county or district (Trans., p. 7-8). After the trial had begun and some testimony had been taken, defendant objected to the introduction of any testimony on the same ground, and this objection was overruled and exception taken (Trans., p. 16). Defendant did not undertake to raise the point in any other way during the trial.

After the verdict and judgment defendant filed a motion for a new trial in which he alleged error of the trial court in rulings upon evidence and the instructions, and in other respects, *but defendant said nothing in his motion for a new trial in regard to the matter of jurisdiction or venue, and did not undertake to preserve that question in any manner.* (At that time General Order 18a had been held invalid in the Missouri Supreme Court and the courts of appeals, and the Smith Journey case had not been decided; and the defendant by his motion for new trial apparently abandoned the contention based on General Order 18a.)

After filing the motion for a new trial, and before the case was submitted in the Court of Appeals, the Smith Journey case was decided by this Court, upholding General Order 18a. Thereupon the defendant undertook to renew its contention based upon General Order 18a. And the Court of Appeals, notwithstanding the fact that the point had not been preserved in the motion for a new trial, chose to deal with the question upon its merits.

If the petitioner should obtain a reversal of the judgment of the Kansas City Court of Appeals in

this cause, and the cause were remanded to the Court of Appeals for further proceedings consistent with this Court's opinion, and if the case should come on for a second hearing in the Court of Appeals, the petitioner (the appellant in that court) would of course be met with the contention that it had failed to preserve its point in the motion for a new trial. And the Court of Appeals, under controlling decisions of the Supreme Court of Missouri, would be compelled to uphold that contention, and to refuse to review the question.

It is well settled by the decisions of the Supreme Court of Missouri that before an appellate court of Missouri can review an error of trial courts, an assignment of such error must be made in a motion for a new trial. In the case of *Maplegreen Co.* v. *Trust Co.*, 237 Mo. l. c. 362-363, the Supreme Court of Missouri said:

> "A motion for a new trial, in the system now in vogue, fills a substantial and useful office in administering justice through the courts. Questions are suddenly sprung on a trial judge by versatile and ingenious counsel during the hotfoot of a trial, which he perforce must decide without taking time to consider. No mortal judge is allowed to be so incomparably recondite and ready as to know all the law all the time. If he knew all the law some of the time, or some of the law all the time, or some of the law some of the time (thereby putting himself outside of the class of those who know none of the law none of the time), he rises to a permissible high-water mark of excellence. Accordingly,

> the office of a motion for a new trial is to gather together those rulings complained of as erroneous and solemnly and formally present them, one by one, in black and white, to the judge, in order that he have a last chance to correct his own errors without the delay, expense or other hardships of an appeal. This, on the theory that even a judge is entitled to a last chance—a *locus poenitentiae.*"

And on page 365 of the same case the court said:

> "In this condition of things, although counsel may not have intended to waive these exceptions or waive their complaint of the court in overruling them, *yet they do that very thing by pretermitting all reference thereto in the motion for a new trial.*"

And in *State ex rel.* v. *Woods,* 234 Mo. l. c. 25, the Supreme Court of Missouri said:

> *"Before this court can review the alleged errors, the attention of the trial court must be called thereto by a motion for new tiral."*

It is true that when this case was before the Court of Appeals, that court chose to review the venue question on its merits; but in view of the record, the court could have refused to so review it. The petitioner obtained a review of that question as a matter of grace on the part of the Court of Appeals, rather than as a matter of right. Before the Court of Appeals could have decided the

question favorably to the petitioner, we must assume that that court would have followed the controlling decisions of the Supreme Court, and have held that the point was not presented for review.

While this all relates to a matter of purely state practice, yet we respectfully submit that it is material to urge it here. For in the event the Court of Appeals' judgment were reversed and the cause remanded by this court to that court for further proceedings, *the petitioner would really gain nothing by that course, not having preserved the point properly for review by the Court of Appeals.*

VI.

The mandate of the Court of Appeals was filed in the trial court more than two months before the petition for certiorari was filed in this Court, and the petition should be dismissed because of petitioner's laches.

The judgment of the trial court was affirmed by the Court of Appeals on February 20th, 1922 (Trans., p. 158). The motion for rehearing was denied by the Court of Appeals on April 3rd, 1922 (Trans., p. 169). The petitioner filed no motion, and took no other steps, in the Court of Appeals to obtain a withholding of the mandate. Thereafter on April 14th, 1922, the mandate of the Court of Appeals in this cause was sent down to the trial court and filed therein on that day. (We have filed here the certificate of the clerk of the

Circuit Court of Jackson County, Missouri, showing that fact.)

This all occurred more than two months before the petitioner filed his petition for certiorari in this court, and before petitioner had served notice of his petition upon respondent. Petitioner served respondent with notice of his petition on June 30th, 1922, and filed his petition on July 3rd, 1922—*two months and nineteen days after the mandate of the Court of Appeals had been filed in the trial court.*

This presents an anomalous situation. The petitioner is asking this Court to review a judgment which petitioner by his own laches has allowed to become final, so far as the Court of Appeals and the trial court are concerned. The Court of Appeals lost jurisdiction of the cause when the mandate went down.

There is no reason why petitioner could not have applied to the Court of Appeals for an order withholding the mandate, in order to give the petitioner time in which to prepare his petiton for certorari and present the same to this court. The Missouri practice in such cases would have afforded petitioner ample opportunity to have the mandate held, if he had made the proper application. As the Supreme Court of Missouri said in *State ex rel. Berkshire* v. *Ellison,* 230 S. W., l. c. 972:

> "It is clear that the aggrieved party should be granted by the appellate court, if notice is given of a desire to apply for our writ of certiorari, a reasonable time to make such application and procure our ruling thereon. *This the appellate courts of this state have*

always done so far as we have been able to learn."

This Court had occasion to deal with a similar situation in the recent case of *Magnum Import Co. v. DeSpoturno Coty*, Advance Opinions 1922-23, l. c. 588, where the court said:

> "The petition should, in the first instance, be made to the Circuit Court of Appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. That court is in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari; and second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate."

But the petitioner did not choose to follow the approved practice, and stood idly by and allowed the mandate of the Court of appeals to go down to the trial court, and the judgment of the trial court thereby to become final.

Petitioner did not even file a motion in the Court of Appeals, during the March term, 1922, requesting that court to *recall* its mandate, as he might have done.

In short, the petitioner did nothing, but waited until July 3rd, 1922, (the last day on which to file petition for certiorari in this court), and then filed his petition here.

We respectfully submit that such dilatory practice ought not to be encouraged, and the laches

of the petitioner bars him from obtaining the review he seeks.

State ex rel. Berkshire v. *Ellison*, 230 S. W. l. c. 972-973.

For the reasons submitted in our original brief and in the foregoing supplemental brief, we respectfully pray that the petition be dismissed, or that the judgment be affirmed.

Respectfully submitted,

WILLIAM S. HOGSETT,
MURAT BOYLE,
MONT T. PREWITT,
Counsel for Respondent.

DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. *v.* WECHSLER.

CERTIORARI TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

No. 70. Argued October 12, 1923.—Decided October 22, 1923.

1. A decision of a state court denying an objection to jurisdiction based on a federal regulation, upon the ground that the objection was waived by the appearance of the party making it, is reëxaminable by this Court. P. 24.
2. Where the Director General of Railroads, being sued upon a cause of action for personal injuries, in a state court whose practice permitted uniting a plea to the jurisdiction with a defense on the merits, pleaded a general denial and also that the court was without jurisdiction because the action was not brought in the proper county as required by a federal regulation governing the place for suits against carriers while under federal control, and his successors, designated by the President under the Transportation Act, 1920, successively entered appearance and adopted the answer theretofore filed, *held*, that a decision of the state court, treating the objection to the jurisdiction as going to the venue of the cause and as waived by the appearances, could not be sustained as a decision disposing of the case on a local ground independent of the federal question raised. *Id.*
3. The Transportation Act, 1920, § 206, (a), (d), does not invalidate a defense good when it was passed. P. 25.

209 Mo. App. 570, reversed.

CERTIORARI to a judgment of the Kansas City Court of Appeals, (the Supreme Court of Missouri having declined to review,) awarding damages to the plaintiff Wechsler, for personal injuries suffered upon a railroad, while it was under federal control.

Mr. Roy B. Thomson, with whom *Mr. O. H. Dean*, *Mr. Albert E. Stoll*, *Mr. H. M. Langworthy* and *Mr. M. W. Borders* were on the briefs, for petitioner.

Mr. William S. Hogsett, with whom *Mr. Murat Boyle* and *Mr. Mont T. Prewitt* were on the briefs, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit for personal injuries suffered by the plaintiff (the respondent here) upon the Chicago Great Western Railroad on January 3, 1920, while that road was under federal control. The suit was brought against Walker D. Hines, the Director General, on January 29, 1920, in the Circuit Court of Jackson County, Missouri. The cause of action arose in another county and the plaintiff then and when the suit was brought resided in Illinois. By General Order 18-A it was ordered that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose." The defendant pleaded a general denial and also that the Court was without jurisdiction because of the foregoing facts. The plaintiff by replication relied upon the invalidity of the order, a point now decided against him. *Alabama & Vicksburg Ry. Co.* v. *Journey*, 257 U. S. 111. On February 25, 1921, the plaintiff amended and John Barton Payne, Director General of Railroads and agent designated by the President under Transportation Act, 1920, was substituted by agreement as successor of Hines and according to the record the "substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant." It was not disputed and was stated

by the Court below that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defence on the merits, but it was held by the Court of Appeals, affirming a judgment for the plaintiff, that the provision in General Order 18-A went only to the venue of the action and was waived by the appearance of Payne. A similar effect was attributed to the appearance of the present petitioner Davis in the place of Payne. A writ of certiorari was denied by the Supreme Court of the State.

We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defence on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* v. *Love County*, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge Knights of*

Pythias, 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American Ry. Express Co.* v. *Levee*, decided this day, *ante*, 19.

The Transportation Act, 1920, February 28, 1920, c. 91, § 206, (*a*) and (*d*); 41 Stat. 456, 461, 462, in no way invalidates a defence good when it was passed.

Judgment reversed.